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Supreme Court of the United States

October Term, 1977

No. 77-1308

NATIONAL BROADCASTING COMPANY, INC. and CHRONICLE PUBLISHING CO.,

Petitioners,

v.

OLIVIA NIEMI, a minor by and through her guardian Ad Litem,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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The Petitioners, National Broadcasting Company, Inc. ("NBC") and Chronicle Publishing Co. ("Chronicle") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, entered in this proceeding on October 26, 1977.

Opinions Below

The October 26, 1977 opinion of the California Court of Appeal is reported at 74 Cal.App.3d 383, 141 Cal.Rptr. 511 (1977) and is set forth as Appendix A to the Petition. The order of the Court of Appeal denying, without opinion, a petition for rehearing is unreported and is set forth as

Appendix B hereto. The California Supreme Court's January 19, 1978 order denying a hearing to review the Court of Appeal decision is unreported and is set forth as Appendix C hereto. The Memorandum of Intended Decision, the Judgment, and the Findings of Fact and Conclusions of Law of the Superior Court of the City and County of San Francisco, reversed by the Court of Appeal, are set forth as Appendices D, E and F hereto, respectively.

Jurisdiction

The judgment of the Court of Appeal was entered on October 26, 1977. A timely petition for a hearing to the Supreme Court of California was denied by order entered January 19, 1978 and this Petition has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1970).

Question Presented

Do the First and Fourteenth Amendments to the United States Constitution permit the imposition by a state of tort liability on the broadcaster of a dramatic work, on the theory that the broadcaster was "negligent" or "reckless" in presenting the drama because viewers or others might imitate a scene in the drama and commit criminal acts resulting in injury?

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Statement of the Case

On September 10, 1974, NBC televised the drama "Born Innocent" to a national television audience. The two hour program was broadcast in the San Francisco area by KRON-TV, a television station owned and operated by Petitioner Chronicle Publishing Co.

The presentation dealt, in fictional dramatic form, with the life of an unwanted child and society's ineffective and, ultimately, oppressive efforts to deal with her plight. It concerned a teenage girl who, unwanted at home, is committed to a reformatory as a runaway. In one segment of the drama the teenage protagonist is subjected to an assault by other female inmates of the reformatory and a "rape" with a blunt instrument is implied.

Proceedings Below

On October 9, 1974, Plaintiff filed her complaint in this action in the Superior Court of California in and for the City and County of San Francisco. The complaint (Appendix G) is in two counts. In the first, the program "Born Innocent" is referred to and the simulated rape scene described. (¶¶ II, X, XIII) It is alleged that Petitioners (defendants below)* "negligently, carelessly and recklessly" allowed the program to be telecast to the public

* Unnamed sponsors of "Born Innocent" as well as Petitioners were named in the complaint. The action has not been pursued against the sponsors.

in the evening when minors would be likely to watch it (¶¶ XIV, XV)* and that "Defendants . . . knew or should have known that the minds of minors are impressionable and that broadcasting such a scene could cause some minors to imitate such conduct." (¶ XV)

The complaint later alleges that certain minors watched the scene and that "it caused them to decide to do a similar act to a minor" and that as a result of defendants' "negligent, wanton and careless acts" Plaintiff-Respondent and another girl were subjected to an alleged sexual attack on September 13, 1974 by other minors using a Coca-Cola bottle to simulate intercourse. (¶ XVI)

The second purported cause of action repeats the allegations of the first and asserts that defendants "knew that this scene might cause minors to imitate this act and injure a human being; that despite said knowledge [the defendants] wilfully and intentionally televised said program" and that in so doing the defendants "acted maliciously and in reckless disregard of its possible results . . . and plaintiff's welfare and only in concern of their own economic interests." (¶ II)

No theory of liability other than that of imitation is set forth in the complaint. One million dollars in compensatory and ten million dollars in punitive damages are sought.

Petitioners' answer denied all allegations of wrongdoing and asserted, *inter alia,* an affirmative defense of a failure to state a cause of action. (CT 9-12)**

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* Plaintiff-Respondent does not dispute that a warning as to the need for parental guidance in allowing children to view the program was broadcast prior to the showing of the program.

** References to "CT" are to the Clerk's transcript in this case; references to "RT" are to the Reporter's transcript. Both were before the Court of Appeal in this matter. References to "—a" are to the Appendix to this Petition.

Petitioners moved for summary judgment in the Superior Court on the ground that the First Amendment barred recovery and on the further ground that no legal duty was owed to Plaintiff-Respondent (CT 42-65); a copy of the film referred to in the complaint was annexed to the moving papers but was not viewed by the motion judge. (RT 13) The Superior Court denied the motion without opinion. (CT 116) A writ of mandamus or prohibition was sought by Petitioners and denied by the Court of Appeal on August 31, 1976 without reaching the merits of the summary judgment motion. (A copy of this decision is set forth as Appendix H.) That Court did suggest, however, that a California Supreme Court decision which rejected a proffered First Amendment defense in a distinct tort context and which was heavily relied upon by Plaintiff in opposing the motion* was "of doubtful application." (25a)

After denial of the extraordinary writ, the case was set down for trial in the Superior Court. Prior to the impaneling of the jury, Plaintiff made a motion *in limine* to bar all reference to the First Amendment. (CT 132-33) Petitioners moved for dismissal asserting, once again, that the First Amendment barred any cause of action and that Petitioners owed no legal duty to Plaintiff. (RT 5) The trial court indicated that the constitutional issues should be resolved first and viewed the film at that time. Thereafter, after affording an opportunity for further briefing or argument to Plaintiff, and after accepting an offer of proof from Plaintiff (set forth in Appendix I) and treating Petitioners' motion as one for judgment on the issue of law (CT 186; 15a), the trial court rendered a decision

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* *Weirum* v. *RKO General, Inc.*, 15 Cal.3d 40, 539 P.2d 36, 123 Cal.Rptr. 468 (1975).

dismissing the complaint. The Court stated that it "assumed the facts alleged in the complaint to be true" and "took into account the offer of proof by counsel for the plaintiff." (CT 184; 11a)

The Court entered the following conclusions of law:

> "1. Assuming plaintiff's assailants obtained the idea of assaulting her as a result of the telecast of said motion picture, and assuming the other facts alleged in the Complaint and offered to be proved by plaintiff to be true, the law provides no remedy.
>
> "2. Plaintiff's alleged causes of action, and each of them, are barred by the First Amendment to the United States Constitution and Article I, Section 2, of the California Constitution.
>
> "3. Said motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action."* (CT 186a; 16a)

In its opinion rejecting the proffered causes of action, the trial court concluded:

> "The State of California is not about to begin using negligence as a vehicle to freeze the creative arts." (CT 185; 12a)

Plaintiff appealed to the Court of Appeal, First District. That Court reversed the trial court's decision, remanded the matter and directed that a jury be impaneled and that the case proceed to trial (Appendix A); it is with respect to that decision that review by this Court is sought.

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* This third conclusion of law was also made a finding of "constitutional fact." *See* "Finding of Fact" (CT 186a; 16a) and "Memorandum of Intended Decision." (CT 183; Appendix D)

The opinion of the Court of Appeal acknowledged that significant First Amendment protection must be accorded dramatic presentations. The opinion correctly concluded that the question of whether a program "falls within any category of unprotected speech may, where the facts are not disputed, constitute a question of law." (141 Cal.Rptr. at 514; 5a)

Nonetheless, the Court of Appeal rejected the ruling of the trial court that the purported causes of action were barred, as a matter of law, by the First Amendment. The opinion of the Court indicated that issues of fact were present requiring a jury determination under California law, subject only to subsequent judicial "reevaluation of the evidence" (*id.;* 6a) in light of First Amendment considerations.* The Court of Appeal held that:

> "[T]he case is not presently ripe for such a determination, appellant having been deprived of her constitutional right to present before a jury evidence which she contends will show that, ***despite First Amendment protections,*** the showing of the film 'Born Innocent' resulted in actionable injuries. (Cf. ***Weirum*** v. ***RKO General, Inc.*** (1975) 15 Cal.3d 40, 123 Cal.Rptr. 468, 539 P.2d 36.)" (141 Cal.Rptr. at 514; 6a) (emphasis added)

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* The Court did not articulate any factual issue which could have properly barred judgment on First Amendment grounds, but indicated that an issue of fact for the jury was presented as to whether or not the program "advocate[d] or encourage[d] violent and depraved acts" (*id.*; 5a) so as to constitute some form of incitement. It so held despite the fact that neither incitement as such, nor any of its elements, was ever pleaded below (Appendix G); nor was any offer of proof made as to this subject or any of its elements. (RT 69-73; Appendix I) The legal misapprehension of the Court of Appeal as to the nature of incitement is dealt with, *infra,* at 11n.**

Petitioners' motion for rehearing to the Court of Appeal was denied on November 7, 1977 (Appendix B); their petition for a hearing to the California Supreme Court was denied on January 19, 1978, three justices voting to hear the matter (Appendix C). Petitioners urged in both courts, *inter alia*, that no actionable injuries could be proven since, given the complaint and the offer of proof, the First Amendment, as a matter of law, barred Plaintiff's purported causes of action.

The Stay Applications

A petition for a stay of the mandate of the Court of Appeal was sought from that Court and denied by it on February 2, 1978. On that same date, a motion for a stay pursuant to 28 U.S.C. § 2101(f) (1970) was made to Mr. Justice Rehnquist. In his Chambers Opinion of February 10, 1978, Justice Rehnquist stated he was

> "quite prepared to assume that [this] Court would find the decision of the Court of Appeal sought to be stayed a 'final judgment' for purposes of 28 U.S.C. § 1257(2) pursuant to its holding in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). But the mere fact that the Court would have jurisdiction to grant a stay does not dispose of all the prudential considerations which, to my mind, militate against the grant of the application in this case." (46 U.S.L.W. at 3523)

Based on such "prudential considerations", the stay was denied. The matter has been remanded to the Superior Court in San Francisco where a trial date has not yet been set.

REASONS FOR GRANTING THE WRIT

Introduction

This Petition presents the single question of whether the tort of "imitation" may, consistently with long-standing First Amendment principles, be permitted to survive. The tort theory urged upon the California courts in this case is as simplistic as it is novel, as insidious as it is unbounded. Those who create and exhibit dramatic works are, Plaintiff asserts, liable for injury caused by imitation of any aspect of the expression. Such liability extends to any individual injured by those who allegedly act in imitation of the expression, no matter how depraved the actor who actually causes the injury;* and the liability exists notwithstanding the absence of any intent to bring about such imitation or injury on the part of those upon whom such liability is to be imposed.

Such a theory—Plaintiff's only theory—would not simply chill free expression; it would, in the words of the trial judge who rejected it as unconstitutional, "freeze the creative arts." (CT 185; 12a) Yet the California Court of Appeal has ordered a trial to be held based on just that theory.

Whatever the result of such a trial, the potential inhibiting effect of the continued viability of the tort itself can hardly be overstated. If Petitioners prevail at trial on one of a number of their factual defenses—*e.g.*, that the assailants of the Plaintiff did not even view the program—the tort fashioned in the case would still survive. And, of course, if Petitioners should fail to prevail at trial, the

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* In the present case, Plaintiff has asserted that at least one of the girls who allegedly committed the assault involved in the case "had a disturbed mind" and a criminal record. (RT 48)

months or years that would ensue during the process of appellate review could not help but chill the range and variety of the entirety of the creative arts.

What must, we submit, be determined is whether the tort of imitation is to be permitted to survive. We believe it may not and that it is essential that such a ruling be made now.

I.

Creation of Potential Tort Liability Predicated on the Possibility of Imitation by Viewers of Telecast Dramas Would Imperil the Vigor of Artistic and Journalistic Efforts and Violate the First Amendment.

A. *Expression That Would Be Punished by the Imposition of Liability for the Tort of Imitation Is Fully Protected by the First Amendment.*

The First Amendment reflects a fundamental judgment of our nation's founders, confirmed by experience through the years, that except with respect to "certain well-defined and narrowly limited classes of speech,"* society's best interests dictate that free expression not be limited by punishment or sanction, whether by governmental authorities or by private citizens acting under and through judicial or other governmental authority. This Court has thus characterized the "narrowly limited classes of speech" which fall beyond the protection of the First Amendment as encompassing the "lewd and obscene, the profane, the libelous and the insulting or 'fighting' words. . . ." (*Chaplinsky* v. *New Hampshire, supra,* 315 U.S. at 572)

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* *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571 (1942); *see also Cohen* v. *California,* 403 U.S. 15, 19-20 (1971).

The complaint in this action does not allege that "Born Innocent" fits into any of these categories;* it does not even refer or allude to the concepts. Similarly, neither the complaint nor even the offer of proof proffered by Plaintiff prior to the trial court's rendering of judgment (Appendix I), asserts facts which could satisfy this Court's test for incitement set forth in *Brandenburg* v. *Ohio,* 395 U.S. 444, 447-48 (1969).** The novel tort asserted here is

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* Of course, the fact that "Born Innocent" was a drama presented on television—a visual and aural medium—in no way detracts from the First Amendment protection afforded the presentation. *See Rosenbloom* v. *Metromedia Inc.,* 403 U.S. 29 (1971); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973).

Dramatic expression and dramatic presentations have long been held protected by the First Amendment. *See, e.g., Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1975); *Miller* v. *California,* 413 U.S. 15 (1973); *Kingsley International Pictures Corp.* v. *Regents of the University,* 360 U.S. 684 (1959).

** In *Brandenburg,* this Court found unconstitutional a conviction based on the Ohio Criminal Syndicalism statute. The Court held that:

> "[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where *such advocacy* is *directed* to inciting or producing imminent lawless action and is likely to incite or produce such action." (395 U.S. at 477) (emphasis added). *See also Hess* v. *Indiana,* 414 U.S. 105 (1973).

In this case, neither the complaint nor the offer of proof even suggested that the drama advocated anything, let alone that it was directed to inciting any particular conduct. The complaint simply asserted the foreseeability of imitation. Thus, as a matter of law, the complaint—even as supplemented by the offer of proof—is inadequate to state a claim as to incitement or to raise any factual issue as to the matter.

The Court of Appeal, which held such a factual issue to have been raised, may have done so because it erroneously understood that it was necessary for defendants to show that the program did not "advocate or *encourage* violent or depraved acts" in order for defendants to prevail as a matter of law. (5a) The "encourage" standard is in flat conflict with *Brandenburg.* The significance of this erroneous understanding of the rule is reflected in the Court

one based *entirely* on the prospect of imitation on the part of an immense unknown and unseen audience.

This Court has consistently held that, absent "fighting words" not involved here, free expression may not be restricted simply because of a possible reaction on the part of even a finite audience, physically confronted by the speaker. Thus, in *Cohen* v. *California*, 403 U.S. 15 (1971), the Court was asked to sustain a California breach of the peace conviction based on the danger perceived by the California Court of Appeal that defendant's display on his jacket of certain offensive words made it "reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant. . . ." (*Id.* at 17) Mr. Justice Harlan, writing for the Court, made clear that this reliance by the Court of Appeal on

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of Appeal's conclusion that the trial court found that the film did not "encourage violent or depraved acts" and that this was the basis of its decision. (2a) A conclusion as to whether or not a film "encourage[d]" particular actions may or may not be a matter of fact, as the Court of Appeal concluded, but it was utterly irrelevant to the issue before the trial court or the Court of Appeal. The trial court did not apply this erroneous standard; on the contrary, it correctly applied the *Brandenburg* test and held that "Born Innocent":

> "is not, in whole or in part, directed to inciting or producing imminent lawless action." (CT 186a; 16a)

Given the pleadings and offer of proof, this was entirely proper, even had the Court not viewed the film. Having viewed it, the Court properly determined that no issue of fact could exist as to intent to advocate and that it could not permit this issue to go to a jury. This was properly a threshold issue of law "for the trial judge in the first instance." *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966); *and see id.* at n.15; *cf. Wasserman* v. *Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir.) (Wright, J., concurring), *cert. denied*, 398 U.S. 940 (1970). The trial court so held in its third conclusion of law quoted above. That the trial court also characterized the conclusion as a matter of "constitutional fact" (CT 183; 10a) and a "finding of fact" (CT 186a; 16a), of course, in no way alters the fundamental nature of the determination.

the foreseeability of a criminal response by some individuals was "untenable." (*Id.* at 23)

> *"There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression.* The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves. Cf. *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966); *Cox* v. *Louisiana*, 379 U.S. 536, 550-51 (1965)." (403 U.S. at 23) (emphasis added)

Precisely the same may be said of this case.

B. *The Undefined and Sweeping Reach of the Tort of Imitation Threatens the Vigor of All Journalistic and Creative Endeavors.*

The dramatic presentation in question in this case involved a fictional portrayal of an unpleasant, but very real world. It is a reality that attacks of this kind dealt with in the film do occur. If a plaintiff can compel a broadcaster (or a playwright or a publisher) to defend himself before a jury on a claim that some depraved individual imitated events in a drama delving into the darker side of life,* telecasting serious drama and art surely becomes far less attractive to those contemplating its potential costs. If

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* From the Greek tragedians through Shakespeare, Dostoevski, Genet, and still more modern authors, many writers have concluded that by depicting violence and affliction, they can most effectively explore the nature and limits of man's humanity.

fiction based on reality may, if allegedly imitated, provide a basis for liability, it can be argued that there is little to prevent the courts from basing liability on imitation of reality itself: on imitation of events depicted as part of media coverage of the news. Are there to be jury trials with respect to imitations alleged to follow the telecasts of reports of a series of assassinations? Is a station which broadcasts an account of a crime or civil unrest to be liable if imitation occurs? Surely censorship achieved through such indirect means would be at least as pernicious as the direct restraints held unacceptable by this Court.* *Cf. Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976).

This Court has recognized the serious danger of chilling expression inherent in imposing tort liability with respect to speech or press activities. It has, in a series of decisions over the last fifteen years, limited liability even with respect to such well-established torts as libel. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). The danger impelling such rulings is the fear that law—whether statutory or case law—fashioned without taking account of the First Amendment "dampens the vigor and limits the variety of public debate." (376 U.S. at 279)

As Mr. Justice Frankfurter stated in *Kingsley International Pictures Corp.* v. *Regents of the University*, 360 U.S. 684 (1959):

* The significance attached to this case by creative artists, NBC's broadcast competitors, and scholars is reflected in the unusual number of *amicus curiae* briefs filed in the California courts by, *inter alia*, The Writers Guild, The Motion Picture Association of America, The California Broadcasters Association, CBS Inc., American Broadcasting Companies, Inc. and the American Library Association, each commenting extensively on the inhibiting effect of a decision according any credence to a rule of law such as that sought by Plaintiff. A number of entities and individuals filed *amicus curiae* briefs on behalf of Plaintiff as well.

> "The ultimate reason for invalidating such laws is that they lead to timidity and inertia and thereby discourage the boldness of expression indispensable for a progressive society." (Franfurter, J., concurring) (*Id.* at 695)

Here, if anything, the potential for inhibition is far greater than in libel or even obscenity cases. A tort based on imitation is so vague as to defy rational prediction as to what may or may not lead to liability. This would itself have provided a basis for sustaining the trial court's rejection of such a tort on First Amendment grounds.* It provides ample basis for plenary review by this Court.

II.

The Decision of the Court of Appeal Is a Final Judgment and in All Respects Ripe for Review.

The Court of Appeal decision is a final judgment for purposes of 28 U.S.C. § 1257. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Mr. Justice Rehnquist recognized this fact, even as he denied the requested stay in this matter on prudential grounds.

> "I am quite prepared to assume that the Court would find the decision of the Court of Appeal sought to be stayed a 'final judgment' for purposes of 28 U.S.C. § 1257(2) pursuant to its holding in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)." (46 U.S.L.W. at 3523)

The test set forth in *Cox Broadcasting* is a "pragmatic" one and in applying it this Court "looks to the whole

* *See Winters* v. *New York*, 333 U.S. 507 (1948); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 217-18 (1975); *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966).

record" in assessing finality. *Local 438, Construction Laborers* v. *Curry,* 371 U.S. 542, 551 (1963).

In *Cox Broadcasting* this Court recognized that where, as here, a final determination of a federal question had been made by the state court, but further proceedings in the state court might "obviate later review of the federal issue," (420 U.S. at 486 n.13) review is appropriate

> "if a refusal immediately to review the state-court decision might seriously erode federal policy. . . ." (420 U.S. at 483)

In *Cox,* as here, the federal policy threatened by the state court determination was that of freedom of expression. There, as here, state appellate review of federal questions in a novel tort action had led to a remand for a state trial despite objections that the claim was barred by the First Amendment. There, as here, there were non-federal grounds upon which the defendant could have prevailed at trial.* Nonetheless the court in *Cox* held the decision to be final and ripe for review, stating:

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* In this case, for example, Petitioners could well prevail on the basis that Plaintiff's assailants had not even watched the program; that the assailants were aberrational members of society, one with a criminal record; and the like. But if Petitioners were to prevail on such grounds, the tort fashioned in this case would still survive the case—precisely what this Court in *Cox* sought to avoid. As the Court held in *Cox:*

> "That the petitioner who protests against the state court's decision on the federal question might prevail on the merits on nonfederal grounds in the course of further proceedings anticipated in the state court and hence obviate later review of the federal issue here is not preclusive of our jurisdiction. *Curry, Langdeau, North Dakota State Board of Pharmacy, California* v. *Stewart,* 384 U.S. 436 (1966) (decided with *Miranda* v. *Arizona*), and *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), make this clear. In those cases, the federal

> "[Defendants] may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all. Moreover, even if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. Delaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' 'an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press.' *Tornillo, supra,* at 247 n.6. On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability for broadcasting the victim's name, this litigation ends. Given these factors—that the litigation could be terminated by our decision on the merits and that *a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt*—we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality. *See Gillespie* v. *United States Steel Corp.,* 379 U.S. 148 (1964); *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. at 124; *Mills* v. *Alabama,* 384 U.S., at 221-222 (Douglas, J., concurring)." (420 U.S. at 485-87) (footnotes omitted) (emphasis added)

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issue having been decided, arguably wrongly, and being determinative of the litigation if decided the other way, the finality rule was satisfied." (420 U.S. at 486 n.13)

Precisely the same factors militate in favor of finality here. The California Court of Appeal has reversed the trial court's decision that the First Amendment bars the purported cause of action as a matter of law; it has held instead that issues of fact requiring a jury trial exist and has done so based, in part, on a misapprehension of this Court's decision in *Brandenburg* v. *Ohio, supra.** Its decision, of which review was denied by the California Supreme Court, suggests to would-be plaintiffs and defendants alike that the burdens and expense of a jury trial may be imposed on the media and others under the imitation theory. The chilling effect of just such a prospect—its invitation to timidity and excess caution—is already real. As in *Cox Broadcasting*, the press (and other authors and dramatists) are already "operating in the shadow of the civil . . . sanctions of a rule of law . . . the constitutionality of which is in serious doubt." *Cox Broadcasting* v. *Cohn, supra*, 420 U.S. at 486. The decision of the Court of Appeal rejecting the trial court's dismissal of this action on First Amendment grounds is final and the Court has jurisdiction to review it.

In denying Petitioners' application for a stay in this matter, Mr. Justice Rehnquist concluded that certain "pru-

* The Court of Appeal did hold open the possibility that subsequent factual review, presumably informed by First Amendment standards, could lead to reversal of a verdict for Plaintiff-Respondent. This prospect, necessarily premised on a view that the claim is not barred as a matter of law, does not affect this Court's jurisdiction. While *Cox* speaks of nonfederal grounds remaining to be tried, the presence of federal grounds other than those finally decided by the state court should not preclude a finding of finality where, as here, the mere pendency of a constitutionally suspect claim invites self-censorship. In fact, a reversal of a jury verdict based on an evidentiary review would itself pose a serious threat of self-censorship, for it would implicitly sanction the tort of imitation in some circumstances, while simultaneously thwarting review of just that premise. Only review by this Court at the present stage can avoid that danger.

dential considerations . . . militate against the grant of [such] application." (46 U.S.L.W. at 3523) Assuming that these considerations may be thought to apply with equal force in considering a petition for certiorari as on an application for a stay, Petitioners submit that, on balance, the prudential concerns involved here militate strongly in favor of the granting of a writ of certiorari.

Mr. Justice Rehnquist stressed his view that an insufficient showing of "irreparable injury" had been made in this case. (*Id.* at 3524) In *Cox Broadcasting* v. *Cohn* and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) this Court held that the chilling effect resulting from State decisions refusing to invalidate restrictions on a range of expression limited in scope if great in significance, was so unacceptable as to warrant immediate review. The threat of inhibition here is far greater, for the tort here sweeps across all forms of expression; any work may be imitated in a fashion subjecting those associated with it to potential liability—or at least to trial—at the behest of any of an enormous reservoir of potential plaintiffs.

Mr. Justice Rehnquist has suggested that the Court of Appeal decision lacks precision and that this militates against review. (*Id.* at 3523) In many respects, the decision, like the tort it considers, is vague; this heightens the threat to protected interests, however, and militates in favor of review. The crucial aspects of the decision are, in any event, clear. The Court reversed the trial court's conclusion that the action was barred as a matter of federal constitutional law; it found issues of fact to be tried with respect to a theory of incitement, in part, by employing a standard unacceptable under this Court's decision in *Brandenburg*; and in making these rulings the Court accepted the premise that Plaintiff could conceivably introduce "evidence" which might demonstrate "actionable

injuries" "despite First Amendment protections." (141 Cal.Rptr. at 514; 6a) Each of these aspects is clear and, we submit, dangerously wrong.

Although Mr. Justice Rehnquist has suggested that the decision "might have been based on a state procedural ground," (46 U.S.L.W. at 3523) Petitioners submit that the decision was not so based and that, even if it had been, such procedural basis would be so insubstantial and so intermingled with the federal policy it compromised, that it could not constitute an independent state ground for decision.

The issue of whether a tort of the general kind alleged here may ever reach the jury is surely a federal question. *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). The distinct question of whether the tort alleged here raised a question of fact* which could go to the jury is wholly intermingled with federal substantive law. *See Greenbelt Cooperative Publishing Ass'n* v. *Bresler,* 398 U.S. 6, 13 (1970); *Time, Inc.* v. *Pape,* 401 U.S. 279, 290 (1971); *Beckey Newspapers* v. *Hanks,* 389 U.S. 81, 85 (1967) *(per curiam); cf. Fiske* v. *Kansas,* 274 U.S. 380 (1927).

Nor may the decision of the Court of Appeal properly be characterized as resting on any independent and adequate state ground relating to the propriety of the trial judge viewing the film before rendering his decision. For one thing, the trial judge explicitly held that taking the allegations of Plaintiff's complaint and offer of proof as true, "the law provides no remedy" and the "plaintiff's

* The only fact question specifically suggested by the Court of Appeal concerned whether or not the film in question could constitute incitement. Whether such question is one of fact or rather a threshold issue of constitutional law (*see Rosenblatt* v. *Baer, supra,* 383 U.S. at 88 and n.15); *cf. Wasserman* v. *Time, Inc., supra* (Wright J., concurring)) is itself a federal question and intermingled with the basic issue on this Petition.

alleged causes of action . . . are barred by the First Amendment. . . ." (CT 186a; 16a) These legal conclusions of the trial court mandated dismissal in themselves whether or not the film was viewed, and were entirely appropriate in connection with the judgment rendered by the trial court.*

In any event, to attribute to the Court of Appeal the view that the trial judge might not properly see the film on a motion for judgment on the legal issue, while (as the Court itself recognized) it might do so on a motion for summary judgment would be to attribute a triviality to the appellate decision inconsistent with its own acknowledgment of the important constitutional protections involved.** Such a holding simply could not, under any circumstance, provide an adequate state ground for decision. *Staub* v. *City of Baxley,* 355 U.S. 313, 318-20 (1958); *Davis* v. *Wechsler,* 263 U.S. 22, 24-25 (1923). Indeed, if the Court of Appeal did allow so trivial an issue to dictate that Petitioners submit to the rigors of a trial with the attendant

* Under California law, judgment on the pleadings may be granted at or before trial whether or not a prior challenge to the complaint's legal sufficiency has been denied. 4 Witkins California Procedure § 161, at 2816-17 (2d ed. 1971). This provision was cited by the trial court. (11a) Such findings were also appropriate under sections 591 and 592 of the California Code of Civil Procedure (West 1976) which mandate that issues of law be tried by the court (§ 591) and that where "there are issues both of law and fact," the issue of law must first be disposed of (§ 592).

** This reading was suggested by the Plaintiff-Respondent to the California Supreme Court. The Court of Appeal itself recognized, however, that the issue of incitement might have been determined "from viewing [the film] in connection with a motion for summary judgment." (5a) Under settled California law, a summary judgment motion may be renewed. *Schulze* v. *Schulze,* 121 Cal.App.2d 75, 262 P.2d 646 (1953); 4 Witkins California Procedure § 195, at 2842 (2d ed. 1971). It would thus be totally unreasonable—and unfair—to attribute to the Court of Appeal the conclusion that the trial court, while entitled to rule on the film as a matter of law on such a motion, lost the power to do so by otherwise characterizing the motion before it.

risk of inhibition of themselves and others, this would itself deprive Petitioners of their constitutional rights. *See Speiser* v. *Randall,* 357 U.S. 513, 520-21, 525-26 (1958); *cf. Rosenblatt* v. *Baer, supra,* 383 U.S. at 88 and n.15.*

The decision of the California Court of Appeal resurrects a lawsuit, the mere pendency of which poses substantial risks of inhibition across the entire spectrum of artistic and journalistic endeavor. Review and reversal by this Court is required to end the "uneasy and unsettled constitutional posture [which can] only further harm the operation of a free press." *Miami Herald* v. *Tornillo, supra,* 418 U.S. at 247 n.6.

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* It is precisely to avoid the inhibition created by the mere pendency of groundless lawsuits that summary procedures have become the " 'rule', and not the exception, in defamation cases," for example, *Guitar* v. *Westinghouse Electric Corp.,* 396 F.Supp. 1042, 1053 (S.D.N.Y. 1975), *aff'd mem.,* 538 F.2d 309 (2d Cir. 1976). *See also, Washington Post Co.* v. *Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967); *Time, Inc.* v. *McLaney,* 406 F.2d 565, 566 (5th Cir.), *cert. denied,* 395 U.S. 922 (1969).

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment and opinion of the California Court of Appeal.

Dated: March 17, 1978

Respectfully submitted,

FLOYD ABRAMS
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APPENDIX

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

1 Civil 40580 (Superior Court No. 681-053)

Filed—Oct. 26, 1977

OLIVIA N., a minor,

Plaintiff and Appellant,

vs.

NATIONAL BROADCASTING CO., INC., et al.,

Defendants and Respondents.

Olivia N. appeals from a judgment of dismissal which the court rendered before the commencement of a scheduled jury trial in her action against respondents National Broadcasting Co., Inc. and the Chronicle Broadcasting Company.

Appellant's complaint sought damages from respondents for injuries allegedly inflicted upon her by certain juveniles who were acting upon the stimulus of observing a scene of brutality which had been broadcast in a television drama entitled "Born Innocent." The subject matter of the television film was the harmful effect of a state-run home upon an adolescent girl who had become a ward of the state. In one scene of the film, the young girl enters the community bathroom of the facility to take a shower. She is then shown taking off her clothes and stepping into the shower, where she bathes for a few moments. Suddenly, the water stops and a look of fear comes across her face.

Appendix A

Four adolescent girls are standing across from her in the shower room. One of the girls is carrying a "plumber's helper," waving it suggestively by her side. The four girls violently attack the younger girl, wrestling her to the floor. The young girl is shown naked from the waist up, struggling as the older girls force her legs apart. Then, the television film shows the girl with the plumber's helper making intense thrusting motions with the handle of the plunger until one of the four says, "That's enough." The young girl is left sobbing and naked on the floor.

It is alleged that appellant, aged nine, was attacked by minors at a beach in San Francisco. It is alleged that the minors attacked appellant and another minor girl, and forcibly and against her will, "artifically raped" appellant with a bottle. The complaint alleges that the assailants had seen the "artificial rape" scene in "Born Innocent" and that the scene "caused them to decide to do a similar act to a minor girl."

When the case came on for jury trial, respondents moved, before impanelment of a jury, that the court first determine for itself the "constitutional fact" of "incitement"—i.e., whether the film, "Born Innocent," was a vehicle for "inciting" violent and depraved conduct such as the crimes of the juveniles in the present case, of which appellant was the victim.

The trial judge viewed the entire film, made a finding that it did not advocate or encourage violent and depraved acts and thus did not constitute an "incitement," and rendered judgment for respondents without impaneling a jury. The present appeal followed.

Analysis of this appeal commences with recognition of the overriding constitutional principle that material communicated by the public media, including fictional material

Appendix A

such as the television drama here at issue, is generally to be accorded protection under the First Amendment to the Constitution of the United States. (*Joseph Burstyn, Inc.* v. *Wilson* (1952) 343 U.S. 495, 501; *Winters* v. *New York* (1948) 333 U.S. 507, 510.) In *Joseph Burstyn, Inc.* v. *Wilson, supra,* at p. 501, the court stated:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters* v. *New York,* 333 U.S. 507, 510 (1948):
>
> "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

(Fn. omitted; *see also Kingsley Pictures Corp.* v. *Regents* (1959) 360 U.S. 684, 690.) "There is no doubt that entertainment, as news, enjoys First Amendment protection." (*Zacchini* v. *Scripps-Howard Broadcasting Co.* (June 28, 1977) 45 L.W. 4954, 4958.) As the court stated in *Rosenbloom* v. *Metromedia* (1971) 403 U.S. 29, 41:

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs." *Time, Inc.* v. *Hill,* 385 U.S. 374, 388 (1967).

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U.S. 88, 102 (1940).

Specifically, television broadcasting is a medium which is entitled to First Amendment protection. (See *Red Lion Broadcasting Co.* v. *FCC.* (1969) 395 U.S. 367, 386; *Writers Guild of America, West, Inc.* v. *F.C.C.* (C.D.Cal. 1976) 423 F.Supp. 1064, 1147.) Thus, expression by means of television dramatization is included within the free speech and free press guarantees of the First and Fourteenth Amendments. Where a television broadcast does not involve unprotected speech, the constitutional protection for free speech limits the state's power to award damages in a negligence action based upon the broadcast. (See *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, 265, 277-278.)

The freedom of speech guaranteed by the First Amendment is not, of course, absolute. Certain narrowly limited classes of speech may be prevented or punished by the state consistent with the principles of the First Amendment. Speech which is obscene is not protected by the First Amendment. (*Miller* v. *California* (1973) 413 U.S. 15, 23, 34-35, reh. den. 414 U.S. 881.) "Born Innocent" is not constitutionally obscene. "[L]ibel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like" are also outside the scope of constitutional protection. (*Konigsberg* v. *State Bar* (1961) 366 U.S. 36, 49, fn.10.) Generally, libel and slander are considered outside the

scope of First Amendment protection because "there is no constitutional value in *false* statements of *fact.*" (*Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, 340; emphasis added.) However, the free speech guarantee even requires that some protection be given to falsehood, in certain circumstances, "in order to protect speech that matters." (*Gertz* v. *Robert Welch, Inc., supra,* at p. 341.) The constitutional freedom for speech and press also does not immunize "speech or writing used as an integral part of conduct in violation of a valid criminal statute." (*Giboney* v. *Empire Storage Co.* (1949) 336 U.S. 490, 498.) Additionally, speech which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action, is also outside the scope of First Amendment protection. (See *Brandenburg* v. *Ohio* (1969) 395 U.S. 444, 447-448.)

The question whether the television film "Born Innocent" falls within any category of unprotected speech may, where the facts are not disputed, constitute a question of law. (*L.A. Teachers Union* v. *L.A. City Bd. of Ed.* (1969) 71 Cal.2d 551, 556; *Johnson* v. *County of Santa Clara* (1973) 31 Cal.App.3d 26, 32.) In the present case, the film itself was available and the court might perhaps have determined from viewing it in connection with a motion for summary judgment, that the film did not advocate or encourage violent and depraved acts and thus did not constitute an "incitement." (See *Paris Adult Theatre I* v. *Slaton* (1973) 413 U.S. 49, 56, reh. den. 414 U.S. 881; *Jenkins* v. *Georgia* (1974) 418 U.S. 153, 159-160, 161; *Chaplinsky* v. *New Hampshire* (1942) 315 U.S. 568, 574.) But a motion for summary judgment had earlier been

denied by another judge. No such motion was pending when the trial judge rendered the decision now under review.

Trial by jury had been demanded by appellant. That demand put into operation her right, under California Constitution, article I, section 7, to have all fact issues in the case determined by a jury. The trial court's action in viewing the film, and thereupon making fact findings and rendering judgment for respondents, was a violation of appellant's constitutional right to trial by jury. It was both reversible error and an act in excess of jurisdiction. (4 Witkin, Cal. Procedure (2d ed. 1971) Trial, § 73, p. 2908.)

Here, it is appropriate to acknowledge that, if the cause had proceeded properly to trial before a jury and a verdict awarding damages to appellant had been the result, it would have been the responsibility of the trial court, or perhaps of this court on appeal, to determine upon a re-evaluation of the evidence whether the jury's fact determination could be sustained against a First Amendment challenge to the jury's determination of a "constitutional fact." (*Rosenbloom* v. *Metromedia, supra,* 403 U.S. 29, 54.) But the case is not presently ripe for such a determination, appellant having been deprived of her constitutional right to present before a jury evidence which she contends will show that, despite First Amendment protections, the showing of the film, "Born Innocent," resulted in actionable injuries. (Cf. *Weirum* v. *RKO General, Inc.* (1975) 15 Cal.3d 40.)

The judgment is reversed with directions to impanel a jury and proceed to trial of the action.

CHRISTIAN
Christian, J.

We concur:

RATTIGAN
Rattigan, Acting P.J.*

EMERSON
Emerson, J.**

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* Under assignment by the Chairman of the Judicial Council.
** Retired judge of the superior court sitting under assignment

APPENDIX B

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT
DIVISION FOUR
No. 40580
Filed—November 23, 1977

OLIVIA NIEMI, etc.,
Plaintiff and Appellant,
vs.
NATIONAL BROADCASTING COMPANY, INC., ET AL.,
Defendants and Respondents.

BY THE COURT:

The petition for rehearing filed in the above entitled cause is hereby denied.

Dated: November 23, 1977

CHRISTIAN, J.,
Acting P.J.

APPENDIX C

ORDER DUE
January 24, 1978

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
1st District, Division 4, Civil No. 40380
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

OLIVIA N., a minor,
v.
NATIONAL BROADCASTING COMPANY, INC. ET AL.

Respondents' petition for hearing denied.

Tobriner, J., Richardson, J., and Manuel, J., are of the opinion that the petition should be granted.

Filed: January 19, 1978

/s/ BIRD,
Chief Justice

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 681 053

Filed—September 20, 1976

OLIVIA NIEMI, a minor, by and through her Guardian ad Litem, VALERIA POPE NIEMI,

Plaintiff,

vs.

NATIONAL BROADCASTING COMPANY, INC., and CHRONICLE BROADCASTING COMPANY,

Defendants.

MEMORANDUM OF INTENDED DECISION

The motion picture and television screen play entitled "BORN INNOCENT" broadcast by the defendant television station at 8:00 p.m. on the evening of September 10, 1974, totalling two hours in length was viewed by the Court for two reasons:

Firstly, to determine at a time convenient to Court and counsel whether or not the film in part or in its entirety would be allowed into evidence and viewed by a jury;

Secondly, the film was viewed by the Court for the purpose of finding the Constitutional fact necessarily involved in the question of whether it was protected by the First Amendment of the United States Constitution and Section

Appendix D

9, Article I of the Constitution of the State of California as asserted by defendant.

The Court viewed the film with the agreement of counsel in order to make possible both determinations.

It is the opinion of the Court that the television screen play entitled "BORN INNOCENT" is fully protected by the First Amendment of the Constitution of the United States of America and by Section 9 Article I of the Constitution of the State of California.

In arriving at this decision the Court took into account the offer of proof by counsel for the plaintiff, and furthermore assumed the facts alleged in the complaint to be true.

The motion by counsel for the defense for judgment on the pleadings and the nonstatutory procedure set forth at *Volume 4* of *Witkin's California Procedure* at page 2816 is granted and judgment will be entered for the defendants.

Insofar as counsel for the plaintiff has requested findings of fact and conclusions of law, the Court directs counsel for the defendant to prepare the same. However, it should be understood that the premier fact found by this Court is that the film is Constitutionally protected, and the conclusion of law is based not only upon that preliminary and premier Constitutional fact, but based upon all of the facts set forth in the pleadings by the plaintiff and his offer of proof.

The Court also grants the motion to exclude the film from evidence, and without the film, plaintiff has no cause of action against the defendant. That being the case, there was and is no profit to the plaintiff to proceed by the more usual procedure of waiting until a jury is selected and granting a nonsuit after plaintiff's opening statement, it being the plaintiff's position that everything that could be said on behalf of his case was said during the two days of

Appendix D

discussion and oral and written argument. Furthermore, even less profit would flow to the orderly administration of justice and the position of the plaintiff if a nonsuit were to be granted at the conclusion of his case.

In effect, the Court's ruling on the pleadings and in ruling in advance on the evidence is comparable in practice and in theory to Penal Code Section 1538.5, which has been so successfully used in the criminal law to suppress evidence that is Constitutionally inadmissible.

The Court is of the opinion that *Weirum* v. *RKO General Inc.*, 15 Cal. 3d 40 (1975) is not applicable.

The State of California is not about to begin using negligence as a vehicle to freeze the creative arts.

Dated: September 17, 1976.

/s/ JOHN A. ERTOLA
Judge of the Superior Court

APPENDIX E

[Name and address of attorneys for defendants omitted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO
No. 681-053
Filed—September 29, 1976

OLIVIA NIEMI, a Minor, by and through her Guardian ad Litem, VALERIA POPE NIEMI,
Plaintiff,

vs.

NATIONAL BROADCASTING CO., INC.,
CHRONICLE BROADCASTING CO.,
Defendants.

JUDGMENT

This cause having duly come on for trial before the undersigned September 13, 1976, Lewis, Rouda & Lewis by Marvin E. Lewis appearing for plaintiff and Lillick McHose & Charles by Anthony Liebig and Andrew W. Robertson and Brobeck, Phleger & Harrison by Richard Haas appearing for defendants, and defendants having moved for judgment on the legal issue, the Court having viewed the motion picture "Born Innocent," the matter having been argued and submitted, and the Court having issued its Memorandum of Intended Decision and Findings of Fact and Conclusions of Law, and good cause appearing therefor:

Appendix E

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants have judgment against plaintiff, together with their costs of suit in the sum of $ NONE.

Dated: September 28th, 1976

/s/ JOHN A. ERTOLA
Judge

APPENDIX F

[Name and address of attorneys for defendants omitted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO
No. 681-053
Filed—September 29, 1976

OLIVIA NIEMI, a Minor, by and through
her Guardian ad Litem, VALERIA POPE NIEMI,
Plaintiff,

vs.

NATIONAL BROADCASTING CO., INC.,
CHRONICLE BROADCASTING CO.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having duly come on for trial before the undersigned September 13, 1976, Lewis, Rouda & Lewis by Marvin E. Lewis appearing for plaintiff and Lillick McHose & Charles by Anthony Liebig and Andrew W. Robertson and Brobeck, Phleger & Harrison by Richard Haas appearing for defendants, and defendants having moved the Court for judgment on the issue of law, and the Court having viewed the motion picture "Born Innocent" and issued its Memorandum of Intended Decision herein, and good cause appearing therefor, the Court makes the following:

Appendix F

FINDING OF FACT

1. Said motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action.

CONCLUSIONS OF LAW

1. Assuming plaintiff's assailants obtained the idea of assaulting her as a result of the telecast of said motion picture, and assuming the other facts alleged in the Complaint and offered to be proved by plaintiff to be true, the law provides no remedy.

2. Plaintiff's alleged causes of action, and each of them, are barred by the First Amendment to the United States Constitution and Article I, Section 2, of the California Constitution.

3. Said motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action.

Dated: September 28th, 1976

/s/ JOHN A. ERTOLA
Judge

APPENDIX G

[Name and address of attorneys for plaintiff omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
No. 681-053
Filed—October 9, 1974

OLIVIA NIEMI, a Minor, by and through her Guardian ad Litem, VALERIA POPE NIEMI,

Plaintiff,

vs.

NATIONAL BROADCASTING CO., INC., CHRONICLE BROADCASTING CO., and DOE I through DOE X, inclusive,

Defendants.

COMPLAINT FOR PERSONAL INJURIES

COMES NOW PLAINTIFF OLIVIA NIEMI, a Minor, by and through her Guardian ad Litem, VALERIA POPE NIEMI, and for a cause of action against defendants, and each of them, alleges as follows:

FIRST CAUSE OF ACTION

I

The true names and capacities, whether individual, corporate, associate, or otherwise, of defendants named herein as DOE I through DOE X, inclusive, are unknown to

plaintiff, who therefore sues said defendants by such fictitious names, and plaintiff will amend this complaint to show their true names and capacities when the same have been ascertained.

II

Defendants, DOE I to DOE X, inclusive, are and were at all times herein mentioned, corporations, partnerships, individuals, or unincorporated associations who were sponsors for "Born Innocent".

III

Defendants, DOE I to DOE X, inclusive, previewed said program and with knowledge of its contents, purchased advertising time from defendant NATIONAL BROADCASTING COMPANY, INC. or defendant CHRONICLE BROADCASTING COMPANY, and sponsored the broadcast of said program. By so doing defendants, DOE I to DOE X, inclusive, aided and abetted defendant NATIONAL BROADCASTING COMPANY, INC. and defendant CHRONICLE BROADCASTING COMPANY in broadcasting said program to the general public.

IV

Defendants, DOE I to DOE X, inclusive, after previewing said program and with knowledge of its contents, continued to sponsor or become sponsors for said program even though other potential advertisers withdrew their sponsorship after previewing said program and viewing said scene.

V

Defendant NATIONAL BROADCASTING COMPANY, INC. is and was at all times herein mentioned a duly licensed corporation authorized to do business, and was doing business at all times herein mentioned, in the County of San Francisco, State of California.

VI

Defendant NATIONAL BROADCASTING COMPANY, INC. is and was at all times herein mentioned in the business of producing, directing and broadcasting shows to the general public.

VII

Defendant CHRONICLE BROADCASTING COMPANY is and was at all times herein mentioned a duly licensed corporation authorized to do business, and was doing business at all times herein mentioned, in the County of San Francisco, State of California.

VIII

Defendant CHRONICLE BROADCASTING COMPANY, also known as KRON, is and was at all times herein mentioned in the business of producing, directing and broadcasting shows to the general public.

IX

At all times herein mentioned, defendants, and each of them, were the agents, servants and employees of all other defendants, and were acting within the course and scope of their agency, service and employment.

Appendix G

X

On or about September 10, 1974, defendant NATIONAL BROADCASTING COMPANY, INC., and defendant CHRONICLE BROADCASTING COMPANY, also known as KRON, broadcast a program for television entitled "Born Innocent", starring Linda Blair. Said program was shown to the public in the San Francisco Bay Area and nationally.

XI

Defendants, and each of them, advertised said program and invited the public to watch it.

XII

Said program was televised during "prime time", to wit: at 8:00 P.M.

XIII

Said program included a scene in which a minor female was cornered in a shower room by inmates of a reform school and a foreign object was shoved between her legs and into her vagina.

XIV

At said time and place, defendants, and each of them, negligently, carelessly and recklessly allowed said program to be televised to be viewed by whomever tuned in, including minors.

Appendix G

XV

Defendants, and each of them, knew or should have known that the idea of holding down a young girl and shoving a foreign object into her vagina was a perverted one, and defendants, and each of them, knew or should have known that the minds of minors are impressionable and that broadcasting such a scene could cause some minors to imitate such conduct. Further, defendants, and each of them, knew or should have known that minors would be apt to see the scene since the program was televised at 8:00 P.M. on "prime time".

XVI

That by reason of the negligent, wanton and careless acts of the defendants, and each of them, as hereinabove alleged, said minors did watch said scene and it caused them to decide to do a similar act to a minor girl. That as a direct and proximate result of said negligent, wanton and careless acts hereinabove alleged, said minors attacked plaintiff OLIVIA NIEMI and another minor girl and forcibly and against their will shoved a Coca-Cola bottle into their vaginas. Said attack occurred on or about September 13, 1974, at Baker's Beach in the City and County of San Francisco, State of California.

XVII

That by reason of the premises, and as a direct and proximate result thereof, plaintiff has necessarily incurred reasonable expenses for medical and hospital attention, x-rays, and nursing care, in amounts presently unknown.

Appendix G

Plaintiff prays leave to amend this complaint to insert the true amounts when the same shall be ascertained.

XVIII

By reason of the premises, and as a direct and proximate result thereof, plaintiff has sustained the following injuries:

1. Injury to the nervous system;

2. Injury to the vagina;

3. Great pain, suffering and mental anguish;

4. Other injuries not presently diagnosed. Plaintiff prays leave to amend this complaint to insert the true nature of the same when they shall be ascertained.

Further, plaintiff is informed and believes, and thereon alleges, that said injuries are permanent in nature.

Wherefore, plaintiff has been generally damaged in the sum of One Million Dollars ($1,000,000.00).

Second Cause of Action

As and for a second further and separate cause of action, plaintiff Olivia Niemi, a Minor, by and through her Guardian ad Litem, alleges as follows:

I

Plaintiff incorporates by reference and alleges as though fully set forth herein, Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII of the First Cause of Action.

Appendix G

II

At all times herein mentioned, defendants, and each of them, had actual knowledge of the nature, extent and impact of the attack scene in "Born Innocent"; that defendants, and each of them, further knew that this scene might cause minors to imitate this act and injure a human being; that despite said knowledge, said defendants, and each of them, wilfully and intentionally televised said program; that in televising said program defendants, and each of them, acted maliciously and in reckless disregard of its possible results; that in televising said program defendants, and each of them, acted maliciously and in reckless disregard of plaintiff's welfare and only in concern of their own economic interests and placed their financial interests above those of the plaintiff.

III

That by reason of the malicious and wilful acts of the defendants, and each of them, as hereinabove alleged, said minors did watch said scene and it caused them to decide to do a similar act to a minor girl. That as a direct and proximate result of said malicious and wilful acts hereinabove alleged, said minors attacked Olivia Niemi and another minor girl and forcibly and against their will shoved a Coca-Cola bottle into their vaginas. Said attack occurred on or about September 13, 1974, at Baker's Beach in the City and County of San Francisco, State of California.

IV

That in doing the acts and things hereinabove referred to, defendants, and each of them, acted wilfully and mali-

ciously, and therefore, plaintiff seeks exemplary and punitive damages against said defendants, and each of them, in the sum of TEN MILLION DOLLARS ($10,000,000.00).

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. General damages in the sum of ONE MILLION DOLLARS ($1,000,000.00);

2. Punitive or exemplary damages in the sum of TEN MILLION DOLLARS ($10,000,000.00);

3. For all of plaintiff's items of special damages as may be ascertained;

4. For all of plaintiff's costs of suit;

5. For all such other and further relief as to the Court may seem just and proper.

DATED: October 8, 1974.

LEWIS AND ROUDA

By: /s/ MARVIN E. LEWIS
MARVIN E. LEWIS
Attorneys for Plaintiff

APPENDIX H

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT

DIVISION THREE

No. 39713

Filed—August 31, 1976

NATIONAL BROADCASTING COMPANY, INC.,
CHRONICLE BROADCASTING CO.,
Petitioners,

vs.

SUPERIOR COURT,
CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

OLIVIA NIEMI, ETC.,
Real Party in Interest.

BY THE COURT:

The decision relied upon by the trial court (Weirum v. RKO General, Inc., 15 Cal.3d 40) is of doubtful application to the facts here. But resort to the prerogative writs is not unrestricted (see, e.g., Babb v. Superior Court, 3 Cal.3d 841, 850-851; Oceanside Union H. S. Dist. v. Superior Court, 58 Cal.2d 180, 185, fn.4). Here, the time and burden of trial can be substantially reduced by resort to the provision for separate trial of the issue of liability (Code Civ. Proc., § 598). By such procedure, the film, which may be determinative of the question of incitement, would be in evidence.

Appendix H

Hence, although we do not reach the merits at this time, the petition for writ of prohibition/mandate is denied.

Dated: August 31, 1976

DRAPER P. J.

APPENDIX I

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT No. 6

THE HONORABLE JOHN A. ERTOLA,

JUDGE

No. 681 053

OLIVIA NIEMI, a minor, by and through her guardian ad litem, VALERIA POPE NIEMI,

Plaintiff,

vs.

NATIONAL BROADCASTING COMPANY, INC., and CHRONICLE BROADCASTING COMPANY,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

September 13, 14, 1976

APPEARANCES:

For Plaintiff:

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Appendix I

For Defendants:

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[Afternoon Session—September 14, 1976;
RT 68, line 22—RT 73, line 23]

[Mr. Lewis, Plaintiff's Attorney]: "Now if our California Supreme Court didn't speak out clearly enough for our Court of Appeal, and if I don't read the English language in the Supreme Court case [*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)] which in unmistakable terms by unanimous opinion of our Supreme Court, they said exactly what that case says, that no one who is injured by another's wrong can waive the First Amendment. This was done again by our United States Supreme Court and it is only right, because how can someone, regardless of what the article may be, use that article as they will? Sometimes that article can be used harmlessly and another time it could be used horrendously.

The same article can be used purposely to injure the mind of an infant and mean nothing when used on the mind of an adult. But the finder of fact must determine that after listening to the experts and all of the circumstances of the case.

Appendix I

Now I am saying at this point I want to make an offer of proof in this case, which I have not done up to this point.

I say in my offer of proof in this case I will prove the following:

I will prove by evidence, direct and circumstantial, that the four children that were involved in inserting a beer bottle into the vagina of Olivia Neimi [sic] and forcing another little six-year old child at the same time to insert two of her fingers and play with herself in her vagina, one of them said that she was influenced to do this act by what the girls told her in high school after she had seen the program "Born Innocent."

We will prove by the mother that one of the girls in this act saw the beginning of the program—didn't know how much—and said that she told her daughter to leave the room after she saw a scene—she doesn't remember which—which she didn't think proper for her daughter to watch, from which a jury well could infer that this picture was seen.

We will further prove from a Park Federal Police Officer by the name of Ronald Dondy that when he arrested these girls immediately after this crime and the girl who inserted the foreign object up the vagina of one girl and forced the fingers of the other girl into her vagina she said, "I hope it doesn't happen to you what happened to the girl in that television picture."

We further offer to prove that the officer when he heard that came back the following day and spoke to the other girls and they said, Yes, we did see this picture and we did see this rape scene.

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We will further offer to prove that the girl who inserted the beer bottle said she did it because she was influenced by this very picture of "Born Innocent."

We will prove that NBC for a long period of time, even though they hadn't name [sic] it as such, had what was called the Family Hour when they realized that a great percentage of their audience were young children, and we will also prove that there is a case that has just been concluded where NBC has been fighting for that very hour of 8:00 o'clock, they are no [sic] claiming no violence or sex should go on at that time because it should be called the Family Hour, because it could hurt children.

We will show that in the library of NBC prior to this time they had books and treatises on this very subject written by psychiatrists and psychologists who had made a study of the effect of violence and sex on TV on children of the age of the children that were involved in this case, and particularly on children of disturbed mind.

We will prove by a Doctor Wald who examined one of the girls that inserted the foreign object into the vagina that she was a disturbed girl and that she was the very type of girl who, having seen this picture, would be very apt and probably would attempt to imitate what was seen in that picture.

We will further prove from these experts that the rest of the picture would mean nothing, because the mere fact that we are not considering obscenity—that would have no bearing whatsoever and it would be the effect of that particular scene.

We will further prove that whatever happened later in that particular picture, whatever message might have been shown, would have been wasted, because the children would have been in bed.

Appendix I

We will further prove that that particular scene had no message or no need to be in the picture; that there was nobody punished for ever doing that particular scene.

We will show that the final end of that scene ended in violence where the superintendent of this school was knocked over the head, blood was shown gushing from her head and the girls who were the violent ones walked off defiant, and they were the ones that were in charge, so no message came even if the children had been awake.

We will prove that this is not only a question of experts testifying or circumstantial evidence, even though the crime is within four days of what actually happened, being a very bizarre type of crime of females on females with a foreign object.

We will prove from the girls themselves that this is what influenced them and that it doesn't have to be left to speculation or for anyone to look at this picture.

We will further prove from a Dr. Liebert who wrote the book, "The Early Window—Effects of Television on Children and Youth," and who has made a study of this very subject for years and has lectured in seminars which members of NBC have attended, and other broadcasters have been warning for years that the very thing that happened here would happen unless something was done before the FCC—there has been testimony on this—and that the president of NBC prior to the very time of this incident testified that he agreed that this hour of the night these scenes shouldn't be shown, and realized the danger that could happen with other youngsters imitating this type of violence.

He will also testify that a child seeing this picture would most probably have done exactly what happened here, and will testify that in his opinion the injury that was caused here to this child was a proximate result of the picture "Born Innocent" being shown when it was shown.

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We will show by Dr. Richard Feinbloom, a psychologist from Massachusetts, one of the outstanding experts in the country on this subject the same exact testimony that will be given by Dr. Liebert.

Dr. Robert Wald will testify likewise—and he is the psychiatrist who examined both the Neimi [sic] girl and the girl, Sharon Smith, who was the attacker, and he likewise will testify that this injury to the Neimi [sic] girl, which is a very serious injury and which is probably going to affect her sex life in the future, was caused by this willful, reckless and negligent act on the part of NBC. This testimony also will be borne out by a Doctor Cyril Raymore who is a psychologist who likewise has treated Olivia Neimi [sic] after the affect [sic].

We will bring out from the testimony of the director of NBC here, the Chronicle Publishing Company, that hindsight shows they should never have put the program on at this time.

We will further show that the defendant was a member of a broadcasting association who, because when they received hundreds of thousands of letters all over the United States protesting this scene, made them show it again and practically delete the censorship picture and put the picture on between 11:00 and 12:00 at night rather than at the 8:00 o'clock slot, and admonished them for doing so.

We will further show that they ran a deceiving ad to attract children, specifically where they said it was a child star that was going to star at the age of 15, and the ad that they had was placed on the same page of TV Guide the day before that they were showing a child show called "Born Free," and one of the children here actually thought when he put on the television he was going to watch "Born Free," a story of lion cubs which had been a serial they had been running just before this was put on.

Appendix I

I submit, your Honor—

THE COURT: Is there anything else that you offer to prove?

MR. LEWIS: And the mother will testify, of course, concerning her child.

There will be others that will testify as to the condition of the child. The child herself will testify, and that will be the extent of our proof."

Supreme Court, U. S.
FILED
APR 4 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1308

NATIONAL BROADCASTING COMPANY, INC., and
CHRONICLE PUBLISHING CO.,
Petitioners,

VS.

OLIVIA NIEMI, a Minor, by and through her
Guardian ad Litem, Valeria Pope Niemi,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES

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A BOWNE COMPANY

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In the Supreme Court
OF THE
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OCTOBER TERM, 1977

No. 77-1308

NATIONAL BROADCASTING COMPANY, INC., and
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OLIVIA NIEMI, a Minor, by and through her
Guardian ad Litem, Valeria Pope Niemi,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES

The Respondent, Olivia Niemi, a minor by and through her Guardian ad Litem respectfully prays that this Honorable Court deny a writ of certiorari.

QUESTIONS PRESENTED

1. Do the First and Fourteenth Amendments to the United States Constitution constitute a defense to an action based on negligence in the use of words and conduct proximately causing harm and violating a legal duty?

2. Assuming that the First and Fourteenth Amendments to the United States Constitution constitute a defense to an action of negligence should this be an absolute defense to deprive the plaintiff of the right to present her case before a jury?

STATEMENT OF THE CASE

That on September 10, 1974 NBC televised "Born Innocent" to a national audience.

In the early segment of the television showing a young girl is so graphically shown being raped by other young girls with a plumber's helper so as to cause hundreds of viewers to believe that actual penetration took place.

Congressional records will show that NBC was warned in a congressional hearing concerning the danger of violence as portrayed by television on young minds and promised that they would exercise their duty in showing restraint in the types of scenes portrayed.

That they employed the services of a censor for this very purpose.

That they had in their library books that had been written by psychiatrists and professional experts on the dangers of televising certain scenes that would graphically show violence and warning them of the danger that such scenes could cause to the minds of minors.

James E. Duffy, President of ABC television network confessed in a speech he gave on October 23, 1974 that audience ratings blind television networks to their basic responsibility and in serving themselves, they often do great dis-service to their viewers. Mr. Duffy then pointed out that programs such as "Born Innocent" should not have been shown at such an early hour when children more often than not control the dial.

That NBC network recognized that at the hours of 7:30 p.m. and 8:00 p.m. a large number of children watch television and termed said period of time: "the family hour".

In the case of *Writers Guild of America West v. Federal Communications Commission,* 423 F.Supp. 1064, Petitioner National Broadcasting Company, Inc. prayed to the United States District Court that a family hour shown from 7:00 p.m. to 9:00 p.m. during which time no sex or violence would be shown should be continued. The "Family Hour" was instituted because of the broadcast of "Born Innocent".

The trial judge in the case of *Writers Guild of America West v. Federal Communications Commission, supra,* made a finding that broadcasters were more interested in dollars than the public interest and used violence as a tool to hike program ratings if left free to program in their own discretion. The Court also found that the depiction of violence on television had been a continuing source of congressional and public concern for more than two decades. The Court further found that the United States Senate Appro-

priations Committee joined with the United States House of Representatives to urge the proper agency to exercise its power in the area of television program violence particularly as to its effect on children. The Court further recognized in the opinion that there had been public outcry surrounding scenes of violence particularly the televising of the movie, "Born Innocent".

That Petitioners, National Broadcasting Company, Inc. and Chronicle Publishing Company operating a local station in San Francisco broadcast said picture "Born Innocent" at 7:30 p.m. in all of the midwestern states and in the western states at 8:00 p.m. on September 10, 1974.

That before said program was aired, fifteen proposed commercial sponsors after seeing the preview of the show refused to permit their advertising to be used in connection with said production.

That the Petitioners deliberately used national advertising to induce a youthful audience to watch the program.

That on September 9, 1974 at the same hour that "Born Innocent" was televised Petitioners televised another show called "Born Free" which would be particularly suited for children viewers and concerned itself mainly with the lives of lion cubs.

That the advertisement of "Born Free" and "Born Innocent" had the same makeup and occupied the same place in the two pages of TV Guide and would cause children and their parents to believe that they

were again seeing "Born Free" on the following night if they looked at the advertisement quickly.

That the advertisement concerning "Born Innocent" featured the age of the star of said production namely, Linda Blair who had starred in the movie, "The Exorcist". This advertisement featured the fact that Linda Blair was fifteen years of age. This again was to attract a youthful audience.

That proof that Petitioners believed that said advertisement would attract a youthful audience was shown by their endeavors to unsuccessfully attempt to secure the Walt Disney Productions, Inc. to be one of the sponsors of the program "Born Innocent".

That the crime of inserting an object in the vagina of a female juvenile by other female juveniles is practically unheard of and is a rarity.

That four days after the televising of "Born Innocent" young girls who had seen said rape scene decided to imitate said unusual act and attacked the eight-year old Respondent by inserting a beer bottle in her vagina.

That it was discovered that for over one year after "Born Innocent" was televised girls who had been sent to a juvenile home in Tacoma, Washington were subjected by inmates who had likewise seen the show to an initiation called "Born Innocent Initiation" where physical objects were also inserted in their vaginas.

PROCEEDINGS BELOW

The theory of liability set forth in Respondent's complaint was not based on censorship or obscenity nor does it call for any actions of restraint or prohibition or injunctive relief. It sets forth actions of willfulness and negligence and alleges a legal duty and proximate cause and injury and then prays for damages as the prayer in any negligence action would do. The pleading is limited to the facts of the instant case and does not attempt to place a restraint on the television industry. It merely asks damages under the facts of the instant case should legal liability be shown as a matter of law and proximate cause, negligence and damages be proven to the satisfaction of the trier of fact by a preponderance of the evidence.

Petitioners moved for summary judgment in the Superior Court and did annex the film of "Born Innocent" to the moving papers [R.T. 13]. There is nothing in the record which discloses that the trial judge who denied the motion for summary judgment did not view the film. Even if he did not view the film, under the circumstances it would be immaterial inasmuch as he in effect held that there were questions of fact to be decided. It would have been useless for the trial court to view the film without the aid of an expert to interpret it. It would have been the same if he had examined an x-ray without the aid of the testimony of doctors.

Petitioners then filed a Writ of Mandamus before the Intermediate Appellate Court of the State of California on August 31, 1976. It is not true that said

Court did not affirm the denial of the summary judgment motion. The Court of Appeal denied the Writ of Mandamus for a summary judgment. The Court of Appeal stated in the opinion that they did not determine the merits of the case as there was no need for them to do so.

Petitioners then failed to file a Petition for Hearing before the Supreme Court of the State of California and thus the denial of their motion for summary judgment became final and it was imperative that the trial judge impanel a jury and allow the trial to proceed.

The trial court could not have heard a renewed motion for summary judgment under the California statute inasmuch as there were no new facts and consideration of the question had already been decided against them by the California Appellate Court which opinion had become final and which mandated the trial judge to proceed with the jury trial. [Refer to R.T. p. 3, line 17 through p. 4, line 11; R.T. p. 5, lines 1-14; R.T. p. 11, lines 9-12; R.T. p. 12, lines 26-28; p. 13, lines 1-4; R.T. p. 19, lines 17-27; R.T. p. 20, lines 14-28; R.T. p. 21, line 1; R.T. p. 32, lines 2-7; R.T. p. 32, lines 23-24; R.T. p. 34, lines 2-20; R.T. p. 60, line 12; R.T. p. 86, lines 16-20].

The Court of Appeal correctly stated in its opinion that the trial judge acted in excess of his jurisdiction [Witkin, *California Procedure* (2d Ed. 1971) Trial §73 p. 2908]. (See p. 6a of Appendix A to Petition for Writ).

The trial judge made a Finding of Fact and Conclusions of Law which he was not permitted to do in a jury trial.

THE STAY APPLICATIONS

Petitioners have applied to the Court of Appeal and to the Supreme Court of the State of California and to this Honorable Court for a stay of the trial and each of said Courts have denied said stay.

THERE IS NO REASON FOR GRANTING THE WRIT

It is not true that Respondent has sued Petitioners upon a tort of "initiation".

Respondent has sued on many acts of willfulness and negligence which have been outlined above and which constitute a breach of their legal duty to the public in using the public airwaves. These acts of willfulness and negligence which constitute the tort were caused by imitation by children who are not parties to this action.

It is not true as Petitioners contend that Respondent claims that those who create and exhibit dramatic works are liable for injury if they cause imitation of any aspect of the expression.

Petitioners have contended before all of the previous courts and in their petition to this Honorable Court that if Respondent is successful, no drama can be shown that involves a crime and no criminal event can be given to the public on the news.

We repeat that this case based upon tort should be decided upon its own particular facts.

The same type of argument was advanced by the media when they first opposed the tort of "invasion of privacy".

In the case of *Gill v. Curtis Publishing Company,* 38 C.2d 277 at page 278 the California Supreme Court states that the dissemination of news and information consistent with the democratic processes under the Constitution guarantees of freedom of speech and of the press must be balanced against the public interest in the consideration of the First Amendment of the United States Constitution. The Court then states:

> "It has been objected that a recognition of the right of privacy would open up a vast field of litigation, some of it bordering on the absurd. But courts recognizing the right deny the validity of this objection. According to the latter view, the fact that a recognition of the right would involve many cases near the border line, and would present perplexing questions, is not a good ground for denying the existence of such right or refusing to give relief in a case where it is clearly shown that a legal wrong has been done."

The trial of this case would depend upon particular facts of this case and will in no way freeze the creative arts.

ARGUMENT

I.

THERE IS NO DEFENSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION TO A NEGLIGENCE ACTION.

The California Court of Appeal in its opinion states as follows:

> "appellant having been deprived of her constitutional right to present before a jury evidence which she contends will show that, despite First Amendment protections, the showing of the film, 'Born Innocent,' resulted in actionable injuries." (Cf. *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40.)

The Superior Court of California in *Weirum v. RKO General, Inc.*, 15 C.3d 40, held that there is no defense to the First Amendment of the United States Constitution in a negligence action.

Petitioners attempt to distinguish *Weirum v. RKO, supra,* upon the ground that the California Supreme Court decided the case under the incitement exception to the First Amendment.

It is their contention that in that case the radio station actually urged motorists to speed and drive carelessly through crowded streets and specifically urged motorists to be heedless of the lives and limbs of other occupants of motor cars who may be in the near vicinity.

Having reached this conclusion, they then claim that the Supreme Court of California recognized that such facts brought the *Weirum* case directly within

the incitement exception of the First Amendment and, therefore, *Weirum* cannot be cited to support the law that the First Amendment is not a defense when words cause physical injuries.

Where in the *Weirum* opinion does it appear that the broadcaster told the motorists at what speed to drive their cars?

The first part of the decision is devoted to the determination of whether there was a duty owed by the broadcasters to an innocent member of the public by the negligent utterance of words.

The California Supreme Court in discussing the question of duty was only considering whether there was legal duty and not whether there was an exception of incitement to the First Amendment in the case.

While an attempt is being made to distinguish the act of negligence in the method of broadcasting in the *Weirum* case from the alleged acts of negligence in the instant case the distinction would be only one of foreseeability which as stated by the said Supreme Court is a question of fact for the jury. Furthermore foreseeability is conceded by Respondents.

If as a matter of law there was no legal duty by the broadcaster and a member of the public was killed because of the independent act of someone who heard the broadcast, then the plaintiff could never have won in the *Weirum* case.

The *Weirum* case was not decided on the exception of incitement to the defense of the First Amendment.

Thus, the Supreme Court of California has established in the *Weirum* case that there is a legal duty owed by one who uses the airwaves to carry words or pictures not to injure another.

Once that duty has been established, then the question of proximate cause and foreseeability, which are questions of fact, must then be determined.

At page 47 the Supreme Court states:

> *"Reckless conduct* by youthful contestants *stimulated* by defendant's broadcast constituted the hazard to which decedent was exposed."

The reckless conduct was a question of fact.

Whether the reckless conduct in this case was stimulated by the defendants' broadcast was likewise a question of fact.

The trial judge in this case made a Finding Of Fact. That Finding Of Fact was that the picture "Born Innocent", televised by Petitioners, did not stimulate the wrongful acts of the girls who artificially raped the appellant.

The issue of fact should never have been decided by the judge, and particularly before any testimony, including experts' testimony, was even permitted to be introduced in evidence.

Again at page 47, the Supreme Court states:

> "Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable--i.e., *if the gravity and likelihood of the danger outweighed the utility of the conduct involved.* (See Prosser, *Law of Torts,* 4 Ed. 1971, pp. 146-149)"

It is interesting to note that the California Medical Association has involved itself in this case and filed a brief amicus curiae. This brief advises the Court that the doctors of this State believe that this type of broadcast, under the circumstances of this case, caused children to perform the wrongful act and the doctors further believe that such conduct does stimulate violence by minors.

Conceding this to be true for the purpose of argument, this certainly involves serious danger of a very grave nature. This charge made by the doctors of this State is based on expert opinion. Regardless of this warning of grave danger by the Medical Association of this State can it be said there is no duty?

Now let us look at the utility of the conduct involved.

Does not the prevention of injury or death to a person greatly outweigh the conduct that is involved in this case, which is to permit a large audience of youths to view at an early evening hour the simulated rape by a plumber's helper into the vagina of a 15-year-old child actress?

As so well stated by Your Honorable Court in the case of *Young v. American Mini Theaters,* 49 L.Ed. 2d 310, decided in June, 1976, at page 325:

> "Few of us would march our sons and daughters off to war to preserve the citizens' right to see specified sexual activities exhibited in the theaters of our choice."

To paraphrase this language of Your Honorable Court, few of our parents would be willing to see

their boys march off to war to enforce the right for children at either 7:00 p.m. or 8:00 p.m. at night during the family hour to be able to see an act of perversion simulated upon the body of a 15-year-old girl.

In *President's Council District 25 v. Community School Board No. 25,* 457 F.2d 289, the Court held that public libraries did not violate the First Amendment by refusing to make all books which they considered had pornographic material available to minors.

The Supreme Court of California stated that they were not persuaded that the imposition of a duty in the *Weirum* case would lead to unwarranted extensions of liability.

The finding of duty in this case will likewise not lead to the censorship of all plays and books and newspapers as the briefs on the opposing side would have the Court believe.

As in the *Weirum* case, the damages sought here can only be obtained if it is proven that the Respondents committed a negligent or reckless act and that harm was foreseeable and that harm was proximately caused.

The Supreme Court of California has stated in the case of *Tarasoff v. Regents of the University of California,* 17 C.3d 425, that the most important of the considerations in establishing duty is foreseeability and cites with approval the case of *Weirum v. RKO General, Inc., supra,* and *Dillon v. Legg,* 68 C.2d 728, 738, and *Rodriguez v. Bethlehem Steel Corp.,* 12 C.3d 382, 399.

In the case of *Writers Guild of America West v. Federal Communications Commission,* 423 F.Supp. 1064, the Court states at page 1150:

> "When broadcasters deviate from their own independent determinations of what is in the public interest, they violate their FIDUCIARY responsibilities." (Emphasis added)

Here the Federal District Court likewise recognized the fiduciary responsibility of a television network to the general public. Certainly where there is a fiduciary responsibility, there is a legal duty.

After the California Supreme Court in *Weirum* had found under the tort of negligence that there was duty and that the jury properly could find as a question of fact foreseeability this Court then turned to the contention that the First Amendment was an absolute defense.

There is only one paragraph of the entire decision that deals with the applicability of the First Amendment as a defense. That is the second paragraph of the decision that appears on page 48 which reads as follows:

> "Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. (7) The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."

If as Respondents contend *Weirum* is distinguishable because based on incitement which is an exception to the First Amendment, then the California Supreme Court would have stated that normally the First Amendment would have been a defense in the *Weirum* case but because of the exception of incitement, it did not apply.

The Court clearly stated that deference to society's interest in the First Amendment is clearly without merit where the issue of civil accountability for the foreseeable result of a broadcast creates undue risk of harm. The Court's language also is crystal clear that the First Amendment does not sanction the infliction of physical injury merely because achieved by word rather than act.

What greater proof of undue risk of harm is there than the very fact that the California Medical Association has joined with appellant and has filed a brief in this case setting forth the severe medical effect on children by this particular broadcast?

Any attempt to distinguish the facts of the *Weirum* case from the facts in the instant case is meaningless in the context of what the California Supreme Court has stated with relation to a First Amendment defense.

If the First Amendment cannot be a defense to the infliction of physical injury achieved by word, then what can be accomplished by attempting to compare the facts of the *Weirum* case with the facts in the instant case?

For the purpose of this argument, Respondents admit that the telecast inflicted physical harm upon the appellant.

The above admission squarely brings it within the language of the Supreme Court which holds that under such circumstances the First Amendment is not a defense.

Whether those words were more provocative or more inciting to action than those in the instant case has nothing to do with the defense of the First Amendment under the guidelines outlined by our Supreme Court.

Once Petitioners admit, as they did, that their words caused physical injury to another, the defense of the First Amendment could not be urged and that ends the matter.

Justice Harlan in the case of *Rosenbloom v. Metro Media,* 403 U.S. 29, states at pages 323 and 324 of the opinion as follows:

> "I think we all agree on certain core purposes, First, as a general matter, the States have a perfectly legitimate interest exercised in a variety of ways in redressing and preventing careless conduct no matter who is responsible for it, that inflicts actual measurable injury upon individual citizens. . . ."

And at pages 325 of said opinion:

> "A business is not immune from paying damages because it happens to be the media. THE MEDIA HAS NO SPECIAL IMMUNITY FROM THE GENERAL LAW OF NEGLIGENCE. THAT

DAMAGE HAS BEEN INFLICTED BY A PICTURE RATHER THAN BY OTHER INSTRUMENTALITIES CANNOT INSULATE IT FROM LIABILITY." (Capitals ours)

"SO LONG AS THE EFFECT OF THE LAW OF NEGLIGENCE IS SIMPLY TO MAKE THE MEDIA PAY FOR HARM THEY HAVE NEGLIGENTLY CAUSED TO THOSE TO WHOM THEY OWE A DUTY, THE FIRST AMENDMENT SHOULD NOT BE A DEFENSE."

"If a network refused to pay its bills because to do so would put it out of business, would the First Amendment dictate that this be treated as a defense?"

"If an automobile carrying a newsman to the scene of a history-making event ran over a pedestrian, should a verdict in favor of the pedestrian be based upon generally applicable tort law principles or must it be assessed against the probability that it would deter broadcasters from news gathering before it could pass muster under the First Amendment?"

"THE USUAL TORT RULE IS THAT ONCE SOME FORESEEABLE INJURY HAS BEEN INFLICTED, THE NEGLIGENT DEFENDANT MUST COMPENSATE FOR ALL DAMAGES HE PROXIMATELY CAUSED IN FACT, NO MATTER HOW PECULIAR THE CIRCUMSTANCES OF THE PARTICULAR PLAINTIFF INVOLVED. (Prosser, *The Law of Torts,* Section 50 [3rd Ed.]."

"IT DOES NO VIOLENCE TO THE VALUE OF FREEDOM OF SPEECH AND PRESS TO

IMPOSE A DUTY OF REASONABLE CARE UPON THOSE WHO WOULD EXERCISE THOSE FREEDOMS." (Capitals ours)

The case of *Zacchini v. Scripps-Howard Pub. Co.,* 45 U.S.L.W. 4954, 4957 (U.S. June 28, 1977), was a case involving a suit to recover for the unauthorized televising of a plaintiff's circus act. The Court held that the First nor the Fourteenth Amendment do not immunize the media when they broadcast a performer actor without his consent. At page 4958, it states:

> "Petitioner does not seek to enjoin broadcast of his performance; he simply wants to be paid for it. Nor do we think that a state law damages remedy against respondent would represent a species of liability without fault contrary to the letter or spirit of *Gertz.*"

So in the instant case, we do not seek to immunize the media. We merely want to be paid for damages. We do not seek to impose any prior restraint on the media. We merely seek damages for a negligent and reckless act that has already occurred by the improper time, place and method of telecasting the production.

Petitioners have cited the case of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 11 L.Ed.2d 686, for the legal proposition that the First Amendment should apply in civil lawsuits between private parties just the same as in criminal actions.

It was never the intention of Your Honorable Court to hold that whenever words cause injuries that the First Amendment is an absolute defense.

The very proof of this fact is that the *New York Times* case involved an Alabama statute which related to the tort of libel.

While it is true that the tort of libel today is no longer based upon strict liability but rather upon the principle of negligence, yet the tort still exists.

The tort of invasion of privacy still exists.

Justice Carter in writing the opinion of the Court in the case of *John W. Gill v. The Curtis Publishing Company,* 38 Cal.2d 277, pointed out that while it is true that the right of privacy does infringe upon the absolute freedom of speech and of the press and it also clashes with the interest of the public in having a free dissemination of news and information yet these constitutional guaranties of freedom and speech and of the press do not warrant the publication of matter constituting an invasion of the right of privacy any more than they give the right to defame a person.

Fraudulent representations of the intentional infliction of emotional distress by language or the wrongful interference of a business contract involve speech and yet in the balancing of interest, the innocent person injured by these torts is entitled to redress.

Years ago this Honorable Court made famous the distinction in freedom of speech cases with the example of one who cries fire in a crowded theater.

The person who cries "fire" in a crowded theater does not tell the people in the theater to block the entries or jostle their fellow patrons or do anything illegal.

The use of the word "fire" instills fear and fear results in causing panic.

In the instant case, psychiatrists will testify that just as the person who yelled "fire" may cause panic, the type of scene that was shown in "Born Innocent" may likewise stimulate injurious acts by minors.

The legal doctrine of "The Attractive Nuisance Cases" came into being based upon the well known principle that with children "monkey see, monkey do".

The tort in the instant case was committed by both words and actions.

The Petitioners did not do any imitating.

By their negligent actions it is alleged that they caused someone other than a party to the action to imitate and thus cause the psychic injury to the minor plaintiff.

As Petitioners admit there was a warning given by Petitioners preceding the showing of "Born Innocent" in that parental discretion was advised because of the nature of the production and that it might be harmful to minors.

This warning could not have protected the Respondent who is the innocent victim as she did not receive her injury by viewing the televised picture.

On the other hand, this warning was an admission by Petitioners that some parents might not want their children to see this degenerate scene because it might have a bad effect on their minds.

Whenever there is a compelling State interest involved then there is a compelling interest of the courts to limit it.

When speech and non-speech elements are combined in the same course of conduct a sufficiently important interest in regulating the non-speech element can justify incidental limitations on the First Amendment freedoms.

The above principles of law were stated in the case of *United States v. O'Brien* (1968) 391 U.S. 367 (20 L.Ed.2d 672, 88 S.Ct. 1673). In this opinion Your Honorable Court stated:

> "This court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (See *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748 [48 L.Ed.2d 346, 96 S.Ct. 1817].)

Your Honorable Court in *Bates v. State Bar of Arizona* (..... U.S. pp. ....., ... 53 L.Ed. pp. ....., ..., 97 S.Ct. pp. 2701-2707) holds that the justifications of the restriction of the price advertising by attorneys of routine legal services is permissible. The Court, however, pointed out that even though under the limited facts of this opinion in stating First Amendment rights, a clear tenor of its opinion, including a specific disclaimer of any intent to resolve the problems associated with in-person solicitation, is that it would not accord similar protection to in-person solicitation.

Again, Your Honorable Court in the case of *Bigelow v. Virginia* (1975) 421 U.S. 809 (44 L.Ed.2d 600, 95 S.Ct. 2222) stated in effect that a communication that serves no discernible purpose other than the attraction of clients is outside the scope of First Amendment protection.

Recently in the case of *People v. Kitsis,* 77 C.A.3d Supp. 1 (Cal. Rptr.) decided 12/21/77, the Court held that an attorney could not escape soliciting business otherwise known as "ambulance chasing" by contending that he had freedom of speech under the First Amendment.

The Court held that the First Amendment of the Federal Constitution did not afford an attorney an avenue of escape by claiming that he had the right of free speech.

The Court held that the compelling State interest was protection of its citizens from the probability of fraud, deception and overreaching inherent in the practice of "ambulance chasing".

The compelling State interest involved in this case which requires tort (negligence) liability is the compensation for serious psychological injury proximately caused to a child by the dissemination of a television production during the family hour and by attracting children to watch it by its type of advertising.

Tort liability is the compelling State interest to see that an innocent victim of negligent or willful acts is adequately compensated for the wrongdoing.

II.

EVEN ASSUMING THAT THE FIRST AMENDMENT IS A DEFENSE TO A TORT CAUSED BY WORDS AS WELL AS CONDUCT IT IS NOT AN ABSOLUTE DEFENSE.

A. There is no Louis IV absolutism concerning the First Amendment Defense.

Your Honorable Court many years ago uttered the famous quotation "One cannot yell fire in a crowded theater".

If, during oral argument before this Honorable Court a spectator stood upon his seat and yelled out his political beliefs he would either be immediately rushed out of the chambers by the bailiff or most likely arrested. Could he urge the defense of protection under the First Amendment?

Can one with a truck and loud speaker go through a sleeping neighborhood at 1:00 a.m. proclaiming in loud tones the Bill of Rights?

Can pornographic movies be displayed at a kiddie's matinee in a motion picture theater?

There must always be a balancing of place and time and conditions when the defense of the First Amendment is considered.

Certainly calling out fire in a theater does not constitute fighting words. The result of yelling fire in a crowded theater might lead to a rush by the crowd to the doors thus causing a loss of life and injuries. This is merely injury and proximate cause rather than the test of incitement under the case of *Brandenberg v. Ohio,* 395 U.S. 444.

B. If the trier of fact in the instant case finds negligence there will be no threat to the vigor of journalistic and creative endeavors.

The California Supreme Court's language in *Gill v. Curtis,* 38 Cal.2d 277, which states that if the recognition of the right involves many cases near the border line and presents perplexing questions this is not good ground for denying protection of such rights where it is clearly shown legal wrong has been done, applies here.

In considering the First Amendment defense there is always bound to be a certain clash of interest and the Court must balance the public interest.

The psychiatrists and psychologists and experts in the trial will testify that this particular scene was different than the sword stabbing in Hamlet or the relating of a rape or murder on the 6:00 p.m. news.

How often do we hear that girls insert foreign objects into the vaginas of other girls?

The girls that were portrayed in this scene were modern day girls and in surroundings that were similar and familiar to the children viewers.

The experts will testify that because of this these children could place themselves in the scene and become emotionally involved. Likewise there is the medical likelihood that some of these children would want to attempt to get the thrill out of actually experimenting with this unusual type of act.

These professors and experts have been preaching this message to the broadcasters for years and it has fallen on deaf ears.

This case proves conclusively that the doctors and experts were correct because the children in this case confessed as to their motive in imitating the act and further the very fact that such an unusual and bizarre act was repeated only four days after it was televised is positive proof in itself.

Thus this case must be looked at by itself and on its own facts just as any other negligence case is examined.

If two cars hit at an intersection under certain circumstances, one would not expect the Court to be comparing with what might happen to the impact of different types of cars hitting in different intersections at different times and under different circumstances. There are acts of negligence in this case that would apply to this case and not to others.

In this case, we find commercial companies advising respondents that they will not sponsor "Born Innocent" because of this violent scene.

We will prove that Petitioners put this particular picture on at this particular time for solely commercial reasons in order to meet competition from other networks at this time slot. We will show that the advertisements for this picture were designed to attract children audiences despite the knowledge of the officers of Petitioners that this type of scene should not be shown at this particular hour.

When one is told that at 7:30 p.m. and 8:00 p.m. a five minute scene is presented where one girl simulates jabbing a plumber's helper between the legs of a 15-year-old girl while other children watch and that the scene is so graphic that hundreds of people write letters that they thought they saw penetration it can hardly be believed. It shocks by the mere telling that such an act took place.

How can this compare with an actor placing the point of his sword at the chest of another actor and then the actor pretending to fall dead? Shakespeare contains scenes that suggest adultery and fornication, yet the stark portrayal in textbooks of minors of such acts shown to children would not be acceptable.

As yet, news reporters have found no necessity to plant their cameras in lovers' lane so that they may be on the 6:00 p.m. news to show to the public that fornicating is actually going on in parked cars or even on the 6:00 p.m. news showing actual rapes if they were fortunate enough to have their cameras ready at the time.

Petitioners concede that the First Amendment would not go so far as to permit pornographic movies

to be shown at a Saturday afternoon kiddies' performance even though adults may see them. Why not if there is to be an unlimited defense of the First Amendment?

Perhaps some adults would like to join the audience with the children and watch these pornographic pictures.

We submit that a jury is entitled to hear the medical professors advise them as to their opinion why these minors committed this unusual crime after seeing the scene in "Born Innocent" and give their medical reasons for the same.

Freedom of speech or press does not mean that one can talk or write where, when and how one chooses (see *Beard v. Alexandria*, 341 U.S. 622, 95 L.Ed. 1233).

Your Honorable Court has held that words, pictures and printed matter that come through the mail and harm minor members of the household are not protected (see *Redrup v. New York*, 386 U.S. 767, 18 L.Ed.2d 515).

Respondent contends that a theater can protect children from seeing a pornographic picture or x-rated pictures because they know who comes into a theater and have the power to bar them.

Do Petitioners seriously contend that because they use the public airwaves that belong to the people that they can come into homes and cause harm to minors because they have no control over the homes into which broadcasts enter?

How many children watch television when their parents are not home? Many children have televisions in the bedrooms. Must their parents patrol the room of the child after he closes his door?

The Petitioners justify their position by stating that they put on the screen a warning that this picture may be harmful to the minds of minors.

This very warning is like a red flag in front of a bull to a child. If he was never going to watch the show, he will certainly watch it when this warning appears.

The Petitioners are very careful that they do not affect the minds of adults by commercial ads of lingerie. They would never think of having a live model appear in bra and panty hose because it might invite some man to rape. Thus bras and panty hose float through the air free of any human form.

Petitioners would not permit a glass of beer to touch the lips of the actor or even permit the sight of hard liquor on their screen. Here they do not seem worried about the First Amendment.

C. It has always been the law that every society has a legitimate interest in protecting the health of its children and when this interest clashes with the First Amendment, the protection of the health of the child predominates. (See Vol. 1, Modern Constitutional Law, Antieau, pages 57 and 58 with decisions of the United States Supreme Court within the text.)

Tne following United States Supreme Court opinions held that whenever there is a clash between the United States Constitution damaging the health of

children and freedom of speech, the former must prevail: *Thornhill v. Alabama,* 310 U.S. 88, 84 L.Ed. 1093; *Hughes v. Superior Court of California,* 339 U.S. 460, 94 L.Ed. 985; *Prince v. Massachusetts,* 321 U.S. 158, 88 L.Ed. 645.

In the case of *Akins v. County of Sonoma,* 67 C.2d 185, the Court approved an instruction recognizing the tender and complex character of children and the need to exercise greater care for their protection and safety.

Why did the Petitioners go to the Walt Disney Productions who refused among 15 others to sponsor this production if they did not anticipate through their negligence and recklessness that they would secure a children's audience?

Again, we state emphatically that this case must be viewed narrowly and considered as any other action based upon negligent and reckless conduct would be considered.

There is a different constitutional standard concerning the First Amendment defense when there is a specific aim to direct words or pictures to juveniles as distinguished from adults.

See *First Unitarian Church of Los Angeles v. Los Angeles County,* 311 P.2d 508, which holds the well-known principle of law that there is no absolute right of free speech.

See the case of *Davis v. Macon Telegraph Publishing Co.,* 92 S.E.2d 619, that holds that free press and responsible press should be synonymous.

We respectfully call to the Court's attention those cases which hold that *whenever clear and present danger outweighs the utility of the speech or picture involved, the First Amendment is no longer a defense. Winters v. People of the State of New York,* 330 U.S. 507, at page 510, 92 L.Ed. 840.

The question of what constitutes clear and present danger is always a question of fact. *Danskin v. S. D. Unified School District,* 28 C.2d 536, at page 542; *Bridges v. State of California,* 86 L.Ed. 172; *People v. Garcia,* 37 C.A.2d Supp. 753 at 761; *Roth v. United States,* 354 U.S. 476, 1 L.Ed.2d 1498.

Your Honorable Court has always shown a special regard for juveniles concerning publications by the media. See *Redrup v. New York,* 386 U.S. 767, 18 L.Ed.2d 515, at page 517.

To the same effect, Your Honorable Court states in the case of *Paris Adult Theater v. Slaton,* 413 U.S. 49, 37 L.Ed.2d 446 at page 486:

> "The opinion in *Redrup* and *Stanley v. Georgia* reflected our emerging view that the state interests in protecting children and in protecting unconsenting adults may stand on a different footing from the other asserted state interest . . . .
>
> "If children are not possessed of that full capacity for individual choice, which is the presupposition of the First Amendment guarantees, then the state may have a substantial interest in precluding the flow of obscene material, even to consenting juveniles."

The Court has recognized pictures as encouraging or carrying anti-social behavior in juveniles. We call

the Court's attention to the case of *Kaplan v. Caley*, 413 U.S. 115, 37 L.Ed.2d 492, at 497:

> "For good or ill, a book has a continuing life. It is passed hand to hand, and we can take note of the tendency of widely circulated books of this category to reach the impressionable young and have a continuing impact. (Footnote—Report of the Commission on Obscenity and Pornography 401 [Hill-Link Minority Report]). A state could reasonably regard the 'hard core' conduct described by Suite 69 as capable of encouraging or causing anti-social behavior, especially in its impact on young people."

It is interesting to note that Your Honorable Court here recognizes that the media can produce an anti-social behavior reaction by what it publishes in its import on young people.

This is of particular importance when we observe the language of other United States Supreme Court decisions that are cited in Appellant's Opening Brief that emphasizes *that motion pictures and television have far more impact on their listening audience than does the printed word.*

The concern for young people with regard to the media is again expressed by the Ninth Circuit in the case of *United States v. Pellegrino*, 467 F.2d 41 at page 44:

> "This is not to say that in cases of distribution or exposure to juveniles or of intrusion upon unwilling or unsoliciting adults, the First Amendment protects distribution of all non-obscene materials. *Ginsberg v. New York*, 390 US 629, 20

> L.Ed.2d 195, holds to the contrary that certain non-obscene (under general constitutional standards) material deemed harmful to youth is subject to regulation . . . The point is that in these areas special regulations are necessary to meet these special problems. (*Jacobellis v. Ohio*, 378 US 184, 195, 12 L.Ed.2d 793; Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 938-39; Magrath, *The Obscenity Cases; Grapes of Roth*, 1966 Sup. Ct. Rev. 7, 75-76 and n.295.)"

The Court then held that in the instant case there was no evidence that the appellant was attempting to appeal to an audience of minors. The book involved contained explicit color photographs of female genitalia.

It is obvious that photographs of the naked body have never been considered obscenity. *Yet the Ninth Circuit let it be known that if such literature had been distributed and aimed at audiences of juveniles, the standard would be different.*

The case of *Rowan v. Post Office Department*, 25 L.Ed.2d 763, reminds us that television intrudes upon the privacy of the home.

Again Your Honorable Court considers minors different from adults in the case of *Young v. American Mini Theaters*, 49 L.Ed.2d 310, decided in June, 1976.

In this case an ordinance was passed that adult book stores and adult movie houses had to be located more than 500 feet from a residential area.

In considering the constitutionality of such a statute in face of the alleged defense of the First Amendment, Your Honorable Court states at page 321:

> "The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the City of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, this commodity is essentially unrestrained."

It might be noted that there is no attempt here to keep the public from viewing violence on children or viewing child pornography but this is merely a case seeking damages because of the negligent time and manner in which these scenes were shown.

The Court continues at page 325:

> "Indeed the members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the state could prohibit the distribution or exhibition of such materials to juveniles. Surely, the First Amendment does not foreclose such a prohibition . . . . Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest of expression is of a wholly different and lesser magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment."

In the case of *Ginsberg v. United States*, 390 U.S. 629, the facts involved the *sale to a 16-year-old boy of two girly magazines* that can be found on all of our newsstands. This sale was made in violation of an ordinance that made it unlawful to sell that which is obscene to minors rather than what is obscene to adults. The Supreme Court states as follows in the opinion:

> "The 'girly' picture magazines involved in the sales here are not obscene for adults. But 484-h does not bar the Appellant from stocking these magazines and selling them to persons 17 years of age or older and, therefore, the conviction is not invalid . . . . We have recognized that even where it is an invasion of protected freedom 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults'. *Prince v. Massachusetts*, 321 US 158, 170, 88 L.Ed. 645, 654 . . . . But despite the vigor of the ongoing controversy whether obscene material will perceptibly create a danger of antisocial conduct or will probably induce its recipients to such conduct, *a medical practitioner recently suggested that the possibility of harmful effects to youth cannot be dismissed as frivolous.* Dr. Gaylin of the Columbia University Psychoanalytic Clinic reporting on the views of some psychiatrists in 77 Yale L.J. at 592-593." (Italics ours)

Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419 at 430:

> "This much has been categorically settled by the Court that obscene material is unprotected by the First Amendment."

And at page 431:

> "It is possible, however, to give a few preliminary examples of what a state statute could define for regulations under part (b) of the standard announced in this opinion, supra;—(a) Patently offensive representations or distributions of ultimate sexual acts, normal or perverted, actual or simulated. *In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system.*" (Italics ours)

Thus, Your Honorable Court points out that a state statute under the standard now set forth by the Court, can prevent an offensive perverted sexual act, even if simulated, and certainly if performed on a 12-year-old girl, as was done in the instant case. Again it is interesting to note that in considering such standards, the Supreme Court specifically points out that we must rely on the jury system.

Your Honorable Court continues at page 435:

> "The adversary system with lay jurors as the usual ultimate fact finders in criminal prosecutions has historically permitted the triers of fact to draw on the standards of their community guarded always by limiting instructions on the law."

Another case that points out the difference between the standards for juveniles and the standards for adults is *Quarterman v. Byrd,* 453 F.2d 54 at page 57:

> "Free speech under the First Amendment, though available to juveniles and high school students as well as to adults, is not absolute and the extent of its application may properly take into consider-

> eration the age or maturity of those to whom it is addressed. Thus, publications may be protected when directed to adults, BUT NOT WHEN MADE AVAILABLE TO MINORS. (Footnote—*Prince v. Massachusetts,* 321 U.S. 158, 170; *Ginsberg v. New York,* 390 U.S. 629, 638, *Tinker v. Des Moines School District,* 393 U.S. 503." (Capitals ours)

In the case of *Russo v. Central School District No. 1, Town of Rush, New York,* 469 F.2d 623 (1972), at page 631:

> "CHILDREN IN MANY INSTANCES HAVE MORE LIMITED FIRST AMENDMENT RIGHTS THAN DO ADULTS." (Capitals ours)

The Federal Court again recognized the difference between children and adults when considering a First Amendment defense and states in the case of *Egner v. Texas City Independent School District,* 338 F.Supp. 931 at 944 as follows:

> "School officials are entitled to consider the special characteristics of their charges, such as emotional immaturity. See *Ginsberg v. New York,* 390 U.S. 629, 20 L.Ed.2d 195."

The same holding may be found in the cases of *Sullivan v. Houston Independent School District,* 333 F.Supp. 1149, 1162-1163; 82 Harvard L.Rev. 63, 124-130; *Conners v. Riley,* 395 F.Supp. 1244.

Special legislation concerning censorship as applied to books sold to children was upheld in the case of *People v. Kahan,* 206 N.E.2d 333 at 334:

"REASONABLE RESTRICTIONS MAY BE PLACED ON BOTH THE TIME AND THE PLACE AND THE MANNER OF THE EXERCISE OF FREE SPEECH. *Chambers v. Municipal Court for Oakland, Piedmont Judicial District, Alameda County*, 135 C.Rptr. 95." (Capitals ours)

To the same effect, see *Koppinger v. City of Fairmont*, 248 N.W.2d 708.

It is interesting to note that in the *Chambers* case the Court points out that REASONABLE RESTRICTIONS MAY ALWAYS BE PLACED ON BOTH THE TIME AND THE PLACE AND THE MANNER OF THE EXERCISE OF FREE SPEECH.

This is particularly applicable to the instant case where we claim that the negligence and reckless conduct of Petitioners consisted in the time in which they broadcast the picture and the manner in which they did so and the manner in which they framed their advertisements in order to induce a youthful audience.

The Federal District Court of New York likewise considered the different standards concerning children than adults in the case of *Trachtman v. Anker*, 426 F.Supp. 198 (December, 1976). This case involved the distribution of questionnaires in a school concerning the sexual attitudes of the students. The Court states at page 201:

"First Amendment rights must be applied in the context within which they are asserted . . . what is the potential for psychological harm as a result of the distribution? . . . If defendants can prove

there is a strong possibility the distribution of the questionnaire would result in significant harm to members of Stuyvescent High School, then the distribution could be denied . . . The thrust of defendants' evidence is that serious harm could result if certain students are confronted with particular questions in the survey. The results, defendants claim, is that certain students may become quite apprehensive or even unstable as a result of answering this questionnaire. The Court finds that this reason applies only to students as young as 13 and 14 years of age. Defendants, therefore, did not violate the Constitution in prohibiting distribution at this level."

At page 202:

"FREE SPEECH UNDER THE FIRST AMENDMENT, THOUGH AVAILABLE TO JUVENILES AND HIGH SCHOOL STUDENTS, AS WELL AS TO ADULTS, IS NOT ABSOLUTE, AND THE EXTENSION OF ITS APPLICATION MAY PROPERLY TAKE INTO CONSIDERATION THE AGE OR MATURITY OF THOSE TO WHOM IT IS ADDRESSED. *Quarterman v. Byrd*, 453 Fed.2d 54, 57 (4th Cir. 1971) . . . INFORMATION ABOUT SEX, BOTH CORRECT AND INCORRECT, IS IMPARTED DAILY ON TELEVISION, ON RADIO AND VIA THE RASH OF NEW SEX MAGAZINES ABOUT TOWN. THE COURT FINDS THAT THE SURVEY, AS TO THE OLDER STUDENTS, WOULD OUTWEIGH ANY HARM. THE COURT FINDS THAT THE DOCUMENTS SHOULD NOT BE DISTRIBUTED TO THE 9TH AND 10TH GRADE STUDENTS; THAT SAFEGUARDS

SHOULD BE PROVIDED FOR GRADES 11 AND 12." (Capitals ours)

The Petitioners cite the cases of *Erznoznik v. City of Jacksonville* and *Pacifica Foundation v. FCC* (which relied on *Erznoznik*) for the proposition that dissemination of protected materials may be limited so as not to reach minors only in very limited circumstances. But both cases invalidated speech regulating statutes on grounds of *overbreadth*, claiming that the laws involved in each case could have been drafted more narrowly. This case presents no overbreadth issue because no law, and no direct attempt at regulation by the state, is being challenged; rather the Respondent seeks merely to initiate a cause of action sounding in tort and the Petitioners certainly can level no overbreadth claim against the decisional precedent or statutes sanctioning such an action.

Moreover, *Erznoznik* has since been distinguished by Your Honorable Court. *Young v. American Mini Theaters,* 427 U.S. 50, involved a Michigan ordinance restricting the location of adult theaters. The Petitioners cited *Erznoznik* as a basis for invalidating the ordinance. The Court said:

> "The city council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and becomes a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which this zoning ordinance attempts to avoid, not the dissemination of 'offensive' speech. In contrast, in *Erznoznik* . . . the justification offered by the city rested primarily on the city's interest in protecting its citizens from exposure to unwanted, 'offensive' speech."

Here, the Respondent's tort action is not instituted for the purpose of stifling speech; nowhere does Respondent contend that "Born Innocent" should *never* have been televised at *any* time. Rather, she contends it was negligent to telecast this film in early evening hours. The purpose of her lawsuit, then, is focused upon a "secondary effect" making Petitioners liable for their negligent act. Thus, Respondent's suit fits within the exception engrafted by *Young* upon *Erznoznik*.

The New York Court of Appeals was asked to pass upon the validity of a statute prohibiting the sale of explicit but non-obscene materials to minors. It said:

> The clear implication . . . is that material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.

Three years later, in a case involving a challenge to the same law, Your Honorable Supreme Court expressed similar sentiments:

> We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather [the challenged enactment] simply adjusts the definition of obscenity "to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interest . . ." of such minors . . . That the State has power to make that adjustment, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . ." *Prince v. Massachusetts*, 321 U.S. 158, 170 [1943].

The rule of *Ginsberg, supra,* has been reiterated by later decisions. Thus, the same term, in *Interstate Circuit v. Dallas*, 390 U.S. 676, 690 (1968), the Court said: "We have indicated more generally that because of its strong and abiding interest in youth, a state may regulate the dissemination to juveniles of, and their access to, material objectionable as to them but which a State clearly could not regulate as to adults." Similarly, it was noted in *Trachtman v. Anker,* 426 F.Supp. 198, 201 (S.D. N.Y. 1976) that *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) "did not delineate the circumstances under which the school authorities may proscribe students' First Amendment rights. If defendants can prove there is a strong possibility the distribution of the questionnaire [concerning students' sexual attitudes] would result in significant psychological harm to members of Stuyvesant High School, then the distribution could be denied."

Similarly, in *Conners v. Riley*, 395 F.Supp. 1244, 1251 (W.D. Ark. 1975), the Court remarked: "The *Ginsberg* doctrine applies not only in the context of an actual sale of material in question to a minor but is equally viable in the situation where the material is displayed publicly or displayed in an area to which children have access." The Fourth Circuit has adopted a similar stance: "Free speech under the First Amendment, though available to juveniles and high school students, as well as to adults, is not absolute and the extent of its application may properly take into consideration the age of maturity of those to whom it is addressed. Thus, publications may be protected when directed to adults but not when made available to minors. . . ." (*Quarterman v. Byrd*, 453 F.2d 54, 57-58 (4th Cir. 1971)). So has the Ninth Circuit: "This is not to say that in cases of distribution or exposure to juveniles or of intrusion upon unwilling or unsolicited adults the First Amendment protects distribution of all non-obscene materials. *Ginsberg* . . . holds to the contrary that certain non-obscene (under general constitutional standards) material deemed harmful to youth is subject to regulation. The same surely applies to undue intrusion. . . . The point is in these areas special regulation is necessary to meet these special problems." (*United States v. Pellegrino,* 467 F.2d 41, 44-45 (9th Cir. 1972)).

All these rulings sanction direct state control over the dissemination of otherwise protected materials to juveniles. They authorize regulation of both the sales of and the access of such materials. Here, the State is, if at all, regulating indirectly by providing a forum for a tort suit against a broadcaster who televised such an objectionable program. Given the State's interests in protecting minors, this degree of regulation is entirely permissible and well within the parameters of the *Ginsberg* rule. But Petitioners claim broadcasters, who have no control over their audience, ought to be entitled to a special exemption from this rule. They cite one case (*Butler v. Michigan*, 352 U.S. 380 (1957)) decided by the Supreme Court eleven years *before Ginsberg* to support their view; but that case, besides expressing an antiquated view of the problem, dealt with booksellers, not broadcasters. Conversely, the cases cited (on pages 16-17) refer generally to objectionable materials and make no distinction among the disseminators of such materials.

This Honorable Court in the case of *Young v. American Mini Theaters,* 427 U.S. 50, 69-71, did not distinguish among the ways in which such objectionable films could be accepted or the ability to exclude minors from theaters. Written films could be regulated on the basis of content which even protected materials could be withheld from minors. Thus, the *Ginsberg-Young* rationale evinces courts' desire to afford states great leeway in protecting juveniles and that rationale is broad enough to support the prosecution of a tort action in State courts.

Petitioners would attempt to counter this argument by citing cases like *Erznoznik v. Jacksonville,* 422 U.S. 205 (1975) and *Pacifica Foundation v. FCC,* 556 F.2d 9 (D.C. Cir. 1977). Both these cases invalidated either a State law of a Federal regulation restraining certain types of communications; but both did so on grounds of overbreadth, in that the challenged enactments were phrased too loosely to withstand judicial scrutiny. In this case, no overbreadth issue exists. Certainly Petitioners do not claim the judicial precedent or State statutes vesting plaintiff with a cause of action are themselves constitutionally infirm. Instead, Petitioners rely on dicta taken from these cases to support their dubious thesis. But *Young,* too, talked about *Erznoznik.* In *Young,* a challenge was raised to a Detroit ordinance restricting the placement of adult theaters. The Court distinguished *Erznoznik* as follows:

> The [Detroit] City Council's determination was that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which this zoning ordinance attempts to avoid, not the dissemination of "offensive" speech. In contrast, in *Erznoznik,* supra, the justifications offered by the city rested primarily on the city's interest in protecting its citizens from exposure to unwanted, "offensive" speech. The only secondary effect relied on to support that ordinance was the impact on traffic—an effect which might be caused by a distracting open-air movie even if it did not exhibit nudity (*Young, supra* at 71 n. 34).

Here, the State's provision of a forum to try a tort action is not aimed at stifling speech. The Respondent's claim is that a specific scene in a broadcast film caused her harm, for which she seeks a recovery. The focus of the tort action, then, is not on the curtailment of a type of communication, but rather on ensuring that a specific media defendant pays for the consequences of his negligence. This goal is an example of the "secondary effect" referred to by *Young*. Therefore, Respondent's use of State courts to impose liability on the Petitioners falls within the specific exception engrafted upon *Erznoznik* (and, by extension, *Pacifica Foundation,* which relied on the logic of *Erznoznik*) by *Young*.

D. Assuming that the First Amendment defense applies, it does not mean Respondent should be deprived of a trial. Disputes over constitutional questions and the existence of constitutional facts are no exception to the Seventh Amendment.

Even assuming that in this case there are "constitutional facts" which we strongly dispute, constitutional fact rubric requires de novo appellate review by judges.

Petitioners engaged in a lengthy discussion of "constitutional fact" and the implications in that term that have been explained by various decisions in libel and obscenity cases.

Nowhere, however, do they indicate *what constitutional facts* are at issue in this lawsuit. As defined by *New York Times Co. v. Sullivan,* 376 U.S. 254, 284-286, 11 L.Ed.2d 686 (1964), *the rubric "constitutional*

fact" will be invoked whenever "'. . . a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." In this case, however, it is *never suggested that any intermingling of law and fact* (such as, for example, the concepts of "actual malice" or "public figure" in a libel action) exists with respect to any issue in this lawsuit. Indeed, the Petitioners seem to suggest (p. 16) that the *only constitutional fact involved herein is whether or not "Born Innocent" is actionable.* But that, of course, involves the question of whether the telecasting of that film engendered tortious liability, a question for the jury to decide, and a question which differs significantly from the types of problems referred to by Your Honorable Court in *New York Times, supra.*

Even assuming, however, that this case presents an issue of constitutional fact, Petitioners' analysis of the problems raised by such a designation is specious. They point out, as they must, that whenever a case contains such issues, appellate courts must engage in a de novo review of the facts. This obligation has been summarized well by the Court in *New York Times:* "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied . . . We must 'make an independent examination of the whole record.'" *New York Times, supra,* at 285-86. Accord, *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 54 (1971); *Time, Inc. v. Pape,* 401 U.S. 279, 284 (1971).

From such language the Petitioners derive the principle that whenever a suit is based on a publication, a Court must determine whether or not that publication is constitutionally privileged (p. 15). They claim that the Court of Appeals erred in remanding this case for trial; in fact, the only error is in their misapprehension of relevant precedent.

Although many cases contain dicta to the effect that summary judgments or directed verdicts may be useful in libel suits where media defendants are involved, the following propositions are nevertheless controlling:

1. While *New York Times* announces a standard by which evidence in libel cases will be judged, the manner in which that standard is applied is the same as in all other cases in which it is claimed no issue exists for a jury to decide.

2. Disputes over constitutional fact are no exceptions to the Seventh Amendment.

3. The very fact that a case involves an issue of constitutional fact requires independent de novo review of the trial record by appellate courts; if a summary judgment is granted too hastily, there is no appreciable record available for review and thus such courts are, in effect, precluded from fulfilling their constitutional duties.

4. The key case cited by Petitioners in support of its conclusions about the rule regarding summary procedures in suits involving the First Amendment are (and have been) limited to their facts.

5. Regardless of the presumed need for summary dismissals in libel cases that same necessity does not exist in negligence actions such as this one.

First, Petitioners claim that questions of constitutional fact ought to be decided by judges, not juries. In support of this contention, they cite *Guam Fed'n of Teachers Local 1581, A.F.T. v. Ysrael,* 492 F.2d 438 (9th Cir. 1974), to the effect that a presiding judge in a case involving a media defendant should himself closely scrutinize the evidence in order to determine whether or not a suit should be terminated in the defendant's favor. But this citation is incomplete and is, as a consequence, misleading. The Ninth Circuit went on to state:

> "However, with respect we are not persuaded . . . that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party . . . but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.

> The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury." (*Guam Fed'n of Teachers, Local 1581, A.F.T. v. Ysrael,* 492 F.2d 438, 441 (9th Cir.), *cert. denied,* 419 U.S. 872 (1974)).

In accord with the above citation we respectfully call the Court's attention to *Alioto v. Cowles Communication,* 519 F.2d 438, pp. 441-443 (9th Cir. 1975). Thus, under *Ysrael,* the *scope of a judge's scrutiny in response to a request for a summary dismissal is very limited;* indeed, the decision indicates no *special procedures exist in suits against media defendants,* at least on this point. Later rulings of the Seventh and Ninth Circuits concur with this view. *Carson v. Allied News Co.,* 529 F.2d 206, 213 (7th Cir. 1976); *Virgil v. Time, Inc.,* 527 F.2d 1122, 1130-31 (9th Cir. 1975), *cert. denied,* 425 U.S. 998 (1976); *Alioto v. Cowles Communications, Inc.,* 519 F.2d 777, 780 (9th Cir. 1975), *cert. denied,* 423 U.S. 930 (1976). The Court in *Virgil* said at 1130:

> We cannot agree that the First Amendment requires that the question [of whether or not a given publication concerns a matter of public interest] must be confined to one of law to be decided by the judge. Courts have not yet gone so far in other areas of the law involving First Amendment problems . . . The testing of facts against a standard founded on community mores does entail judgment of the court itself. *But if*

> *there is room for differing views as to the state of community mores or the manner in which it would operate upon the facts in question, there is room for the jury function. The function of the court is to ascertain whether a jury question is presented.*

All these cases indicate that merely *because a suit involves First Amendment issues, the usual procedures governing the granting or denial of a summary judgment are not thereby displaced.* The judge in such cases is not licensed to view the evidence in any fashion when a media defendant seeks dismissal of a complaint, but must conform to the *usual practice and give the benefit of his doubts to the plaintiff.*

Second, a *plaintiff who sues a media defendant is also entitled to trial by jury as guaranteeed by the Seventh Amendment.* If summary procedures are too liberally relied upon in such cases, that entitlement is unjustly abrogated. Several Federal courts have emphasized this point. In *Hotchner v. Castillo-Puche,* 404 F.Supp. 1041, 1050 (S.D.N.Y. 1975), *rev'd on other grounds,* 551 F.2d 910 (2d Cir. 1977), it was said: "Although summary judgment in a defamation action might serve the prophylactic function of sparing authors and publishers the chilling effect of litigation, '[t]his procedural weapon is a drastic device since its prophylactic function, when exercised, cuts off a person's right to present his case to the jury.'" Similarly, in *Taggert v. Wadleigh-Maurice, Ltd.,* 489 F.2d 434, 439 (3rd Cir. 1973), *cert. denied,* 417 U.S. 937 (1974):

> Article III, section 2 of the Constitution gave the Supreme Court appellate jurisdiction "both as to law and fact." This clause produced an adverse public reaction which resulted in the Seventh Amendment preserving the right to trial by jury in civil cases and providing further that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Disputes over "constitutional fact" are no exception to the seventh amendment. . . . just as disputed facts in a nonjury case are determined by trial and not on summary judgment motion, a trial judge's decision to instruct the jury with the *New York Times* standard or an appellate court's de novo review of "constitutional fact" are both made after a full trial on the contested factual issues.

The plaintiff here asks only for the same consideration.

Third, as noted earlier, when *constitutional fact issues exist in a case, appellate courts must engage in an independent de novo review.*

An *appellate court,* of course, can only review a trial record. If, however, summary judgment is granted too quickly, this precludes the compilation of any trial record capable of being reviewed meaningfully. As a result, a court of appeal is denied any opportunity to fulfill its constitutional obligation. This point has been aptly summarized by the Third Circuit in *Taggert* at page 438, wherein it said that a ruling on constitutional privilege in the context of an invasion of privacy claim

> . . . should be made on a record in which the facts have been fully developed. Only with such a record can the necessary balance between the conflicting rights of personal privacy and of freedom of expression properly be struck. We realize that requiring the defendants to defend in a trial rather than to obtain summary judgment puts them to additional expense, and arguably subjects their First Amendment rights . . . to that much extra "chill." In the context of the problem . . . this degree of "chill" seems to us *de minimis* when compared with the unsatisfactory alternatime of ruling on a potentially serious conflict between legally protected rights without a complete record.

Accord, *Gordon v. Random House, Inc.,* 486 F.2d 1356, 1360-61 (3d Cir. 1973), *vacated on other grounds,* 419 U.S. 812 (1974).

The above cited case holds that summary judgments should never be granted with resolve by the Court where the issue of a constitutional fact precludes compellation.

E. Films and television are not entitled to the same constitutional protections afforded newspapers or other written publications.

Your Honorable Court in the case of *Times Film Corporation v. Chicago,* 361 U.S. 43 at p. 49 in referring to motion pictures states:

> "Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process. . . .

> But this position as we have seen, is founded upon the absolute privilege against prior restraint under the First Amendment—a claim without sanction in our cases."

Similarly, in the case of *Southwestern Promotional Limited v. Conrad,* 420 U.S. 546, 557 (1975) the Court warned:

> "Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."

This cautionary stance had been evinced sixteen years earlier, in *Kingsley Pictures Corp. v. Regents of New York,* 360 U.S. 684, 689-90 (1959), wherein the Court stated: "Nor need we here determine whether, *despite problems peculiar to motion pictures,* the *controls which a State may impose upon this medium of expression are precisely coextensive with those allowable for news, books, or individual speech."*

All these cases stand for the proposition that because visual representations differ so significantly from the written word, such representations are subject to distinctive constitutional protections.

Nowhere is this point made clearer than in *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952). That litigation involved a challenge to a provision of New York's education code forbidding the commercial showing of films without the approval of a state censor and allowing that official to withhold his approval on the grounds that a film is sacrilegious. At page 502, the Court said:

> It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. *If there be capacity for evil, it may be relevant in determining the permissible scope of community control* but it does not authorize the unbridled censorship such as we have here.

Unlike *Burstyn,* this case presents no "unbridled censorship". Respondent does not allege "Born Innocent" should never have been shown at any time; nor does she advocate the creation of a censor from whom the networks must seek permission before they telecast a program. Instead, the Respondent merely seeks to impose liability for negligence; the state's granting of such a cause of action is surely within the "permissible scope of community control" to which the Court referred. On pages 502-03, the Court declared:

> To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and places. . . . Nor does it follow that motion pictures are necessarily subject to precise rules governing any other particular method of ex-

> pression. Each method tends to present its own peculiar problems.

Here, too, Respondent asks only for damages that result from the Petitioners' failure to telecast an explicit film at a reasonable time. Certainly, her expectation that the Petitioners would observe reasonable restraints in its televising falls well within the ambit of the limits referred to by *Burstyn*. Moreover, the Court went on to say at page 503:

> The statute involved here does not seek to punish as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon Freedom of expression to be especially condemned.

Unlike Burstyn, this case involves no prior restraint. The Respondent seeks to impose liability *after the fact* for specified conduct. *Burstyn* notes this distinction and indicates that punishment for prior conduct is constitutionally acceptable. The same should be true in the case of the imposition of tortious liability for such conduct. Thus, *Burstyn* and all these cases establish the fact that the First Amendment provides no absolute privilege for filmmakers, but rather affords a degree of protection narrowly circumscribed by the state's ability to exact reasonable restrictions on the time, place and manner in which a motion picture may be exhibited.

Courts have expressed similar limitations with respect to television. In 1969, in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 386-87 (1969), Your Honorable Court noted "Although broadcasting is clearly a medium affected by a First Amendment interest . . . differences in the characteristics of new media justify differences in the First Amendment standards applied to them." Four years later, the Court explained in its holding this case as follows:

> *". . . Red Lion . . . makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation.* Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television and radio cannot be satisfactorily accommodated. The court spoke to this reality when, in Red Lion, we said *'It is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.'"* (*Columbia Broadcasting Sys. v. Democratic Comm.,* 412 U.S. 94, 101 (1973)).

Lower Federal courts have expressed similar views. Thus, in *National Lampoon, Inc. v. American Broadcasting Co.,* 376 F.Supp. 733, 740 n. 2 (S.D.N.Y. 1974), it was said: *"It has generally been recognized that the freedom of expression, and indeed the First*

Amendment rights of licensed broadcasters, are subject to more limitations than publishers, and performers on the stage." Similarly, in *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 477 (2d Cir. 1971), the Court warned "However, the extent of permissible regulation under the First Amendment is not identical for all means of communication. *The peculiar character of the broadcast media requires the application of constitutional standards to their regulation which differ from those applicable to other types of communication.*" The point was best expressed in *Banzhaf v. FCC*, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969):

> The First Amendment is unmistakably hostile to governmental controls over the contents of the press, but that is not to say that it necessarily bars every regulation which in any way affects what the newspapers publish. Even if it does, there may still be a meaningful distinction between the two media justifying different treatment under the First Amendment. Unlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion, including journals, pamphlets, leaflets, and circular letters, which are available to those without technical skills or deep pockets. Moreover, the broadcasting medium may be different in kind from publishing. . . . *Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary*

> *habitual television watcher can avoid these commercials only by frequently leaving the room, changing the channel, or doing some such other affirmative act. It is difficult to calculate the subliminal impact of these pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.*

All these cases conclude that the First Amendment does not absolutely shield broadcasters from regulation by the state. Each of these suits involved direct control exercised by the FCC and, in each case, the controls imposed were upheld as constitutionally permissible. Here, the state is regulating, if at all, only indirectly, by providing the forum for a tort suit against a broadcaster. If Federal courts are amenable to allowing *direct governmental interference* with broadcasting policies, surely the principles announced in such cases should support the kind of indirect "interference" at issue in this case. Any suggestion that the First Amendment exempts negligent telecasts from liability simply ignores the fact that the First Amendment protections accorded broadcasters are not coextensive with those granted other types of media defendants.

F. Even protected speech is subject to a balancing test.

Even if "Born Innocent" were determined to be protected speech that would not foreclose further judicial inquiry. A number of courts have pointed out, in the context of cases involving the media, that even protected speech is subject to a balancing test

in order to determine whether or not it is thoroughly immune from regulation in the public interest.

To this effect, see *Buckley v. American Fed. of Television & Radio Artists,* 496 F.2d 305, at p. 311 where the Court states as follows:

> "Acts of speech and of expression, although protected by the First Amendment are not so exalted that they can never be, even indirectly, obstructed. *Cox v. New Hampshire,* 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). Indeed, even with reference to freedom of the press, the Supreme Court has recently reaffirmed what has long been understood to be the law: '[O]therwise valid laws serving substantial public interest may be enforced against the press as against others, despite the possible burden that may be imposed.' *Branzburg v. Hayes,* 408 U.S. 665, 682-683, 92 S.Ct. 2646, 2657, 33 L.Ed.2d 626 (1972). More specifically, where there is a proper governmental purpose for imposing a restraint and where the restraint is imposed so as not to 'unwarrantedly abridge' acts normally comprehended within the First Amendment, there is no abridgment of First Amendment rights." *Cox v. New Hampshire, supra,* at 574.

The Court is respectfully directed to the case of *Banzhaf v. FCC, supra,* at page 1102 concerning this question of balancing of interest.

The case of *Writers Guild of America West, Inc. v. FCC,* 423 F.Supp. 1064, 1134-35, 1140, 1154 (C.D. Cal. 1976) holds that the First Amendment is not violated by self-regulations of the time and place of televising a program. Here again, the Court is point-

ing out that television stations have a duty to the public and must recognize times and places where certain telecast matter is proper and that such self-regulation does not violate the First Amendment.

That is the exact contention used by Respondent in this case and that because Petitioners who had a duty to the public negligently and with recklessness failed to self-control themselves, a child was seriously injured and for this tortious act on their part they must pay damages. As stated by the Court, this has nothing to do with the First Amendment.

In the case of *Interstate Circuit v. Dallas,* 390 U.S. 676, 690 (1968) the Court states:

> "We have indicated more generally that because of its strong and abiding interest in youth, a state may regulate the dissemination to juveniles of, and their access to, material objectionable as to them but which a state clearly could not regulate as to adults."

In *Conners v. Riley,* 395 F.Supp. 1244, 1251 the Court states:

> "The *Ginsberg* doctrine applies not only in the context of an actual sale of material in question to a minor but is equally viable in the situation where the material is either displayed publicly or displayed in an area to which children have access."

In *Young v. American Mini Theaters,* 44 U.S.L.W. at 5005, it states that the context of material is different involving children than adults. Thus, con-

text may be considered in addition to time and place if the First Amendment is conceded to be a defense.

In *Buckley v. American Fed. of Television & Radio Artists,* 496 F.2d 305, 311 (2d Cir. 1974), it was said:

> Acts of speech and of expression, although protected by the First Amendment, are not so exalted that they can never be even indirectly obstructed. *Cox v. New Hampshire,* 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). Indeed, even with reference to freedom of the press, the Supreme Court has recently reaffirmed what has long been understood to be the law: "[O]therwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed." *Branzburg v. Hayes,* 408 U.S. 665, 682-683, 92 S.Ct. 2646, 2657, 33 L.Ed.2d 626 (1972). More specifically, where there is a proper governmental interest for imposing a restraint and where the restraint is imposed so as to not "unwarrantedly abridge" acts normally comprehended within the First Amendment, there is no abridgment of First Amendment rights. *Cox v. New Hampshire, supra* at 574.

An illuminating example of such balancing is provided by *Zacchini v. Scripps-Howard Pub. Co.,* 45 U.S.L.W. 4954 (U.S. June 28, 1977). That litigation involved a tort action to recover for the unauthorized televising of the plaintiff's circus act. The Court admitted that entertainment enjoyed First Amendment protection in general, but said at page 4957:

> It is evident, and there is no claim here to the contrary that Petitioner's state-law right of publicity would not serve to prevent Respondent from reporting newsworthy facts about the Petitioner's act. Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.

At page 4958, the Court noted:

> "*Petitioner does not seek to enjoin broadcast of his performance; he simply wants to be paid for it.* Nor do we think that a state-law damages remedy against Respondent would represent a species of liability without fault contrary to the letter or spirit of *Gertz* [*v. Robert Welch, Inc.,* 418 U.S. 323 (1974)]."

In *Zacchini, supra,* the Court never did decide whether the speech in question was or was not unprotected. It merely held that, upon balancing the interests of the media vis-a-vis those of Petitioner, one could not say that the First Amendment immunized the former from liability. The Court went on to point out that *Gertz* did not bar tort actions against the media premised upon some underlying theory of fault. The principles of *Zacchini* apply in this case. Here, too, Respondent is not alleging liability without fault. She claims that a specific act of negligence on the part of the Petitioners proximately caused harm to her. Nor is the social utility inherent in televising "Born Innocent" at 8 p.m. (rather than 9 p.m. or 10 p.m.) so great as to pre-

clude a state-law damages remedy against the Petitioners. Therefore, under the balancing test as stated in *Buckley* and as applied in *Zacchini,* it can be seen that the interests of the Petitioners simply do not outweigh those of the Respondent, even assuming that the speech involved in this case is protected.

Assuming that imposition of liability in this case would lead to self-censorship such a result would not be unconstitutional.

This conclusion is borne out by language appearing in the case of *Writers Guild of America West, Inc. v. FCC,* 423 F.Supp. 1064 (C.D. Cal. 1976), which dealt, inter alia, with the constitutionality of the family viewing hour. In that case, the Court repeatedly held that it was "constitutional (even assuming state action) for the networks in the capacity as station owners (i.e., licensees) to adopt a family viewing policy and independently apply it . . ." (*Id.* at 1134). Thus, the Court claimed: "The question of what the needs of the community are at particular times is peculiarly the province of the licensee. If the licensee should determine that an audience is likely to be composed of children and adults at particular hours, nothing in the First Amendment prohibits it from programming accordingly." (*Id.*) At page 1135, the Court went on to say: "Those excluded from the airwaves call this censorship. Those permitted to participate call it visionary editorial decisionmaking. But such decisions are inherent to the broadcasting function and constitutionally protected whether or not state action is present. Therefore independent adoption of and application of a family viewing policy by a licensee does not violate the First Amendment."

Here, Respondent does not ask for state regulation of network telecasting policies; she merely wants to recover for harm caused to her by Petitioners' negligence.

Even assuming such an award will cause networks to televise certain programs at later hours, this unilateral decision is, according to *Writers Guild,* not a violation of the First Amendment.

Thus, the regulatory policy which Petitioners claim will be compelled by recognition of a damage remedy here is itself constitutionally permissible because it entails no more than *self*-regulation. Consequently, Respondent perceives no harm in allowing her to press a lawsuit where an alleged indirect effect of that lawsuit will, at best, yield a course of conduct affirmatively sanctioned by the First Amendment.

CONCLUSION

We respectfully submit that the First Amendment is not a defense to a negligence action.

Respondent's action does not call upon the Court for any prior restraint or for any repression or censorship involving broadcasting.

Even conceding for the purpose of argument only that the First Amendment applies, for the reasons above stated, a writ of certiorari would not be proper at this time.

Dated, April 3, 1978.

Respectfully submitted,
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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1308

NATIONAL BROADCASTING COMPANY, INC. and CHRONICLE PUBLISHING CO.,

Petitioners,

v.

OLIVIA NIEMI, a minor by and through her guardian Ad Litem,

Respondent.

ON A PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

This reply brief is submitted on behalf of Petitioners National Broadcasting Company, Inc. and Chronicle Publishing Co., in further support of their Petition for Writ of Certiorari and in response to Plaintiff-Respondent's April 3, 1978 "Reply to Petition for Writ of Certiorari in the Supreme Court of the United States."

The very arguments urged by Plaintiff-Respondent in opposition to the granting of a writ of certiorari underscore the importance of the issue presented for review, the error of the decision of the California Court of Appeal

of which review is sought, and the propriety of and need for immediate review by this Court.*

Such review would be inappropriate, Plaintiff argues, because the Court of Appeal correctly determined that "despite First Amendment protections" (R. Br. 10), broadcasters of the television drama "Born Innocent" might be held liable for civil damages because a scene in that drama is alleged to have given some individual an idea for a crime. As Plaintiff characterizes the asserted tort theory and the Court of Appeal's decision concerning it, Petitioners broadcast the drama "negligently and with recklessness"; "for this tortious act on their part they must pay damages" and, "[a]s stated by the Court [of Appeal], this has nothing to do with the First Amendment". (R. Br. 61)

Plaintiff does not rely on any prudential factors in opposing certiorari, but rather urges that "negligent" expression is simply unprotected by the First Amendment (R. Br. 10-24) or, alternatively, that a jury may award damages despite First Amendment protections where "negligent" expression results in injury (R. Br. 24-65) and, therefore, that the Court of Appeal correctly held that Plaintiff's claim could not be dismissed without a trial of the factual issue of negligence.

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* The arguments raised in Plaintiff-Respondent's Reply to Petition for Writ of Certiorari in the Supreme Court of the United States (hereinafter cited as "R. Br. ——") are, in certain other respects, either irrelevant or misleading. Thus, Plaintiff attributes to Petitioners certain arguments not advanced by them in the Petition (*see, e.g.*, R. Br. 44); refers to the supposed citation by Petitioners of cases not cited in the Petition (*see, e.g.*, R. Br. 49); and takes equal liberties in "quoting" the language of this Court. *See, e.g.*, R. Br. 17-19, purporting to quote the opinion of Mr. Justice Harlan dissenting in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 66-68, 29 L.Ed.2d 296, 325-26 (1971) and *compare* the actual language of that dissenting opinion.

Thus, Plaintiff characterizes the Court of Appeal as having correctly found the trial court in error in rendering a judgment that the First Amendment barred Plaintiff's claim as a matter of law, where the judgment deprived Plaintiff of the

> "'right to present before a jury evidence which she contends will show that, despite First Amendment protections, the showing of the film "Born Innocent" resulted in actionable injuries.'" (R. Br. 10, *quoting* the decision of the Court of Appeal reproduced in Appendix A to the Petition at 6a)

Significantly, Plaintiff does not even attempt to characterize the Court of Appeal's decision as resting on any interpretation of the test for incitement set forth in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447-48 (1969), or on the propriety of any determination with respect to incitement by the trial court. (*See*, R. Br. 10-13; 25) Nor does Plaintiff suggest that any test of incitement could be met in this case. Rather, Plaintiff simply asserts that a cause of action sounding in negligence may *never* be precluded, as a matter of law, by the First Amendment. (R. Br. 65; *see also*, "Questions Presented" at R. Br. 1-2) Plaintiff's theory of this case, as articulated in this Court and in the Court of Appeal, is well summarized by the submission that each case such as this one

> "must be looked at by itself and on its own facts just as any other negligence case is examined.
>
> "If two cars hit at an intersection under certain circumstances, one would not expect the Court to be comparing with what might happen to the impact of different types of cars hitting in different intersections at different times and under different circumstances.

There are acts of negligence in this case that would apply to this case and not to others." (R. Br. 26)

It would, we submit, be difficult to articulate a view more fundamentally at odds with the First Amendment or more likely, if adopted, to threaten the entire range of artistic and creative expression. Surely the First Amendment stands as a barrier to such an assertion of potential liability, particularly in a case where no assertion is even made concerning incitement or any intent to incite. That a tort should have been recognized by the Court of Appeal permitting a trial based on such a theory—as well as the all but inevitable filing of still more complaints and the holding of still more trials based on such theory—provides ample ground for review and reversal by this Court.*

---

* Trial in this case was scheduled to commence in June, 1978; at the request of Plaintiff, it has been agreed by the parties, subject to Court approval, to adjourn it until August, 1978. The Superior Court of California in and for the City and County of San Francisco has indicated that it will reevaluate the question of when the scheduled trial will commence in light of the action of the Court with respect to this Petition.

CONCLUSION

For the reasons set forth in the Petition and this Reply Brief, a writ of certiorari should be issued to review the judgment and opinion of the California Court of Appeal.

Dated: April 17, 1978

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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April 17, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

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This brief is submitted on behalf of the National Association of Broadcasters ("NAB"), as *amicus curiae* in support of the petition for certiorari sought by Petitioner, National Broadcasting Company, Inc.

CONSENT OF THE PARTIES

All the parties to the proceedings below have given their consent to the filing of this brief and their letters of consent are being filed with the Clerk of this Court.

OPINIONS BELOW, JURISDICTION AND STATEMENT OF THE CASE

NAB adopts the material set forth in the equivalent sections of the Petition for Certiorari.

QUESTION PRESENTED

Do the First and Fourteenth Amendments to the United States Constitution permit the imposition by a state of tort liability on the broadcaster of a dramatic work, on the theory that the broadcaster was "negligent" or "reckless" in presenting the drama because viewers or others might imitate a scene in the drama and commit criminal acts resulting in injury?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

INTEREST OF AMICUS CURIAE

The National Association of Broadcasters is a nonprofit, incorporated association of radio and television broadcasters with a membership which includes 556 television stations, 2550 AM radio stations, 1924 FM radio stations and the major nationwide commercial broadcast networks. NAB is committed to the advancement of broadcast customs and practices which further

the public interest, and to the maintenance of the guarantees of freedom of expression embodied in the First Amendment.

NAB submits this brief *amicus curiae* because it believes that the novel tort of "imitation" fundamentally impairs the First Amendment's guarantees of freedom of expression and that its recognition poses a threat of inhibition which sweeps across virtually the entire range of creative expression, including broadcast programming.

ARGUMENT

The tort theory urged by Plaintiff, upon which the California Court of Appeal has ordered a jury trial to be held, amounts, most narrowly, to the proposition that the broadcaster of a dramatic work is liable for civil damages if imitation of some aspect of that work is foreseeable, occurs, and results in injury. More broadly, Plaintiff's theory and the Court of Appeal's ruling create the prospect that civil liability may attach based on the depiction of any act whose imitation might result in injury. The decision of which review is sought contemplates that such liability might be proven under the imitation theory "despite First Amendment protections" (141 Cal. Rptr. at 514).

The chilling effect on the broadcast media of this Court's failure to review and reverse such a decision would be inestimable. A wide range of broadcast programming, from dramatic works to documentaries, may be imitated in some aspect, by some portion of the audience, in some manner which may result in injury. Commentaries portraying topics of social concern would be particularly vulnerable to claims based on imitation—and to inhibition because of the recogni-

tion of that tort. Virtually no category of programming, however, from historical drama (such as "Roots") to situation comedy (such as "All in the Family") would be exempt from the risk of sanctions or the self-imposed censorship which the tort of imitation would impose.

It is beyond peradventure that California could not impose criminal penalties on such a broad range of expression; neither may it limit such expression through novel concepts fashioned under civil tort law. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277 (1964).[1]

The First Amendment embodies the judgment that the freedom of expression essential to a democratic society may not be limited or suppressed simply because the ideas or information conveyed might be misused. "It is precisely . . . [the] choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). The decision of the California Court of Appeal ignores—all but reverses—that fundamental judgment and mandates, instead, that a jury determine whether expression may result in liability "despite First Amendment protections". Unless reviewed by the Court, such a stark rejection of First Amendment principles will pose a real and substantial threat to the vitality of all broadcast programming.

---

[1] This Court recognized in *Sullivan* itself that "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute," and accordingly held that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." (376 U.S. at 277).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the California Court of Appeal.

Respectfully submitted,

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BRIEF AMICUS CURIAE ON BEHALF OF CBS INC. IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF AMICUS CURIAE ON BEHALF OF CBS INC. IN SUPPORT OF PETITION FOR CERTIORARI

Amicus CBS Inc. adopts petitioners' statements of Opinions Below, Jurisdiction, Question Presented and Constitutional Provisions Involved.

INTEREST OF AMICUS

CBS Inc. is the owner of radio and television broadcasting stations and the operator of radio and television broadcasting networks. Amicus participated in the pro-

ceedings below by filing briefs in both the state court of appeal and supreme court. Its interest in free speech and expression, as a journalistic enterprise and as a broadcaster of entertainment, cultural and public affairs programs, will be severely affected if the decision of the court below is not reversed.

STATEMENT OF THE CASE

In "Born Innocent," a dramatic two-hour motion picture broadcast by the NBC Television Network in September 1974 the plight of an adolescent girl in a women's reformatory was portrayed. The movie focused on the harmful effects of the state-run home, showing how the girl's personality was progressively hardened by her parents, the institution and its inmates. Although complaints were received by NBC from some viewers and affiliates suggesting that the merit of the picture was a subject about which reasonable people might differ, according to one reviewer, "the suspicion lingers that the very seriousness of 'Born Innocent' is what got it into trouble." N.Y. Times, September 29, 1974, at 21. The same reviewer concluded that "[a]lthough the script was flawed . . . , the thrust of the film was a serious and carefully researched examination of a very real social phenomenon. When it worked, 'Born Innocent' was powerful, provocative and terribly disturbing." *Id.*[1]

[1] A reviewer in Chicago noted that the picture's theme had "plenty of applicability . . . in Chicago, where newspaper stories for months have been detailing the abuses and neglect of young people in corrective institutions." Chicago Sun-Times, September 13, 1974, at 62. "An associate of a girls' detention center in Boston felt that the movie would help instigate more desperately needed penal reform," noting that " 'actions such as the rape of the young girl do take place.' " N.Y. Times, September 29, 1974, at 21. Finally, one 16 year old writer to the *New York Times* observed that the film "was actually a constructive experience . . . . It might even create a fear of such places, that it might prevent children from resorting to belligerence or running away, and force them to face their troubles head-on, calmly and rationally.' " *Id.*

In October of 1974, respondent, through her guardian, filed a complaint in the Superior Court of California. It alleged that a few days after the broadcast of "Born Innocent," she was sexually molested by other adolescents (Pet. App. 21a). Respondent contended that her principal assailant was mentally disturbed and obtained the idea for the assault from a rape scene in the picture.

While the complaint alleged that respondent's assailants obtained the idea for their assault from "Born Innocent," it nowhere alleged that the picture incited or urged the commission of an assault. Proposing essentially a tort theory of imitation, the complaint merely alleged that petitioners "knew or should have known . . . that broadcasting such a scene could cause some minors to imitate such conduct" (Pet. App. 21a) and that petitioners "knew this scene might cause minors to imitate this act" (*Id.* at 23a). Claiming that petitioners acted negligently and maliciously, respondent sought general damages of $1,000,000 and punitive damages of $10,000,000.

After viewing the film and accepting as true both the allegations of respondent's complaint and respondent's offer of proof, the California Superior Court found as a matter of both fact and law that the "motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action" (Superior Court Findings of Fact and Conclusions of Law, Pet. App. 11a, 16a). It therefore ruled that respondent's action was barred by the First Amendment and dismissed the suit.

Respondent appealed to the Court of Appeal of the State of California, which reversed the trial court, holding that there were triable issues of fact which required resolution by a jury.

Petitioners sought a hearing in the California Supreme Court. Their petition was denied on January 19, 1978, three justices voting to grant the petition (Pet. App. 9a).

Prior to filing their petition for writ of certiorari in this Court, petitioners sought a stay of the trial below. Mr. Justice Rehnquist denied a stay on the ground that petitioners would not suffer irreparable injury by being required to defend the action below, even if the Court granted certiorari. In so doing, Mr. Justice Rehnquist stated that he was "quite prepared to assume that the Court would find the decision of the Court of Appeal . . . a 'final judgment' for purposes of 28 U.S.C. § 1257(3) pursuant to its holding in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975)."[2] The petition for a writ of certiorari was filed on March 17, 1978.[3]

ARGUMENT

I. The Decision of the Court Below Is Contrary to a Long and Firmly Established Series of Decisions of This Court.

It is clear that the material broadcast here should be and is protected by the First Amendment.[4] It is also clear that First Amendment rights may be violated by permitting civil tort actions, just as they may be violated

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[2] *National Broadcasting Co.* v. *Niemi*, 46 U.S.L.W. 3523 (U.S. Feb. 21, 1978).

[3] 46 U.S.L.W. 3602 (U.S. March 28, 1978).

[4] As this Court observed in *Winters* v. *New York*, 333 U.S. 507, 510 (1948):

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

See also Southeastern Promotions Ltd. v. *Conrad*, 420 U.S. 546 (1975) (protection for theater productions); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (protection for television broadcasting); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) (protection for motion pictures).

by criminal prosecutions. What this Court held with respect to libel in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964), applies with equal force to the proposed tort of imitation:

> "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (Footnotes omitted.)

Accordingly, if broadcasters are to be held accountable in tort for injuries connected in some way with the material they broadcast, it must be done according to a "standard [which] administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). This requirement, set forth most clearly in the libel cases, where harm to another individual and the identity of that individual may usually be appreciated at the time of the publication, applies with even greater force with respect to the tort of imitation, where the broadcaster is induced to avoid the mere possibility that some unknown individual with unique personality disorders will commit a tort in imitation of something observed on television.[5]

We need not look far to discover the standard which should apply in this case. In a long and established line of cases, the Court has enunciated a standard governing speech that threatens injury to other individuals. As far

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[5] Justifying respondent's tort theory on this basis seems "plainly untenable[, for a]t most it reflects an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.'" *Cohen* v. *California*, 403 U.S. 15, 23 (1971), quoting *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 508 (1969).

back as 1914, in *Fox* v. *Washington*, 236 U.S. 273 (1915), Justice Holmes, writing for the Court, recognized the distinction between permitting liability to attach for the expression of an idea and permitting liability to attach for advocating the execution of that idea. In *Fox*, the Court held that liability could be imposed constitutionally only for the latter.

This historical constitutional distinction was perhaps best articulated by Justice Frankfurter in his concurring opinion in *Dennis* v. *United States*, 341 U.S. 494, 545 (1951):

> "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken."

As Justice Frankfurter further noted, "there is underlying validity in the distinction between advocacy and the interchange of ideas." *Id.* at 546. In *Yates* v. *United States*, 354 U.S. 298, 322 (1957), this Court adopted Justice Frankfurter's articulation and held that only advocacy may be prohibited and, even then, only when there is an immediate threat that the advocacy will lead to unlawful behavior. As this Court held in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[6] The state may

[6] Beginning with *Schenck* v. *United States*, 249 U.S. 47, 52 (1919), this Court observed in an opinion written by Justice Holmes:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

[Footnote Continued on Page 7]

not even penalize the "advocacy of illegal action at some indefinite future time." *Hess* v. *Indiana*, 414 U.S. 105, 108 (1973) (per curiam).

The Court's decisions in this area also make it clear that even where there is significant risk that speech will result in unlawful acts, it may not be suppressed unless it rises to the level of unlawful advocacy. In *Terminiello* v. *Chicago*, 337 U.S. 1 (1949), for example, the Court reversed the petitioner's conviction for breach of the peace in circumstances where an angry and turbulent crowd threatened violent responses to petitioner's public address denigrating various political and racial groups. Similarly, in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), the Court reversed appellant's conviction for disturbing the peace where appellant had led a civil rights demonstration in circumstances where the expressed discontent of white onlookers created a risk of violence.

It is clear beyond question that the program involved here did not advocate unlawful action or sexual assault; indeed, it condemned it. Liability here is pinned merely to the communication of an idea, for the broadcasters' allegedly "negligent" and "malicious" acts in this case con-

[6] [Continued]
Sometime later, in *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965), this Court drew the distinction between unlawful advocacy and protected speech by holding that demonstrators peaceably expressing their views could not be convicted for "breach of the peace" where that term had been defined as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." Finally, in *Street* v. *New York*, 394 U.S. 576 (1969), the Court held that a conviction for publicly burning and casting aspersions upon the American flag could not be constitutionally justified by an interest in preventing the incitement of unlawful acts. The defendant's "excited public advocacy of [an] idea" could not be penalized where he "did not urge anyone to do anything unlawful." *Id.* at 591. *See also Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Yates* v. *United States*, 354 U.S. 298 (1957); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949).

sisted solely of broadcasting a motion picture with the knowledge that one of the scenes might be seen by someone who might imitate the assault portrayed in it. Allowing the state to impose liability under such circumstances would clearly inhibit, if not come close to entirely suppressing, the mere interchange of a wide variety of ideas of social, political, artistic, scientific and aesthetic importance.

Under the tort theory advanced by respondent, broadcasters would operate under the fear that their broadcasts would result in massive damage actions by individuals alleging they were injured by third parties committing acts identical or merely "similar" in significant respects to acts portrayed on television. In permitting the penalization of the broadcast here and expressions like it, the theory would "saddle [broadcasters] with the impossible burden of verifying to a certainty" that no harm would come to others as a result of material broadcast by them. *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967). "Fear of large verdicts in damage suits . . ., even fear of the expense involved in their defense, must inevitably cause [broadcasters] to 'steer . . . wider of the unlawful zone.'" *Id.*

The inhibition on free speech which would be created by the proposed tort of imitation is substantially increased by the imprecise and virtually unascertainable standard of conduct which it would require broadcasters to follow. In *Ashton* v. *Kentucky*, 384 U.S. 195 (1966), the Court reversed a conviction for the common-law crime of criminal libel. The nonstatutory crime had been defined by the state court as "'any writing calculated to create disturbances of the peace.'" *Id.* at 198. With First Amendment rights primarily in mind, the Court held that the definition of the crime impermissibly "leaves wide open the standard of responsibility. It involves calculations as to the boiling point of a particular person or a

particular group, not an appraisal of the nature of the comments *per se*. This kind of criminal libel 'makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence.'" *Id.* at 200.

Respondent's proposed tort of imitation suffers from the same defects which were fatal to the common-law crime of criminal libel in *Ashton*. It requires broadcasters to determine the response of millions of viewers and listeners to programs broadcast by them, plainly an impossible task. Moreover, it requires broadcasters to make such judgments not just about the normal individual, about whose behavior we all have some understanding, but also about the aberrant individual whose behavior, even for specially trained persons, may be extremely difficult to predict.[7]

II. The Decision of the Court Below Presents an Important Question Under the First Amendment Which Should Be Promptly Resolved by this Court.

The First Amendment issue presented here was clearly decided by the court below.[8] Moreover, as Mr. Justice

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[7] In construing the Smith Act consistently with First Amendment requirements, this Court held that convictions under that Act for advocating unlawful action were invalid where instructions to the jury had omitted the requirement that the illegal language be "*reasonably and ordinarily calculated to incite persons.*" *See Yates* v. *United States, supra*, 354 U.S. at 315-16, 326 (emphasis in original). Similarly, the Court has required that convictions for the use of "fighting words" be based on language that is "inherently inflammatory," *Street* v. *New York*, 394 U.S. 576, 592 (1969), and "likely to provoke the average person to retaliation." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 574 (1942). Finally, in *Cohen* v. *California*, 403 U.S. 15, 23 (1971), the Court observed that "[t]here may be some persons about with . . . lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression."

[8] Although the Court of Appeal's express holding was that respondent was denied a right to a jury trial under the state consti-

Rehnquist indicated in denying a stay of these proceedings below, the decision of the California Court of Appeal is final for purposes of 28 U.S.C. § 1257(3). This case presents precisely the same situation as in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). In *Cox*, as here, the state courts had rejected the broadcaster's First Amendment challenge to a tort action. There, as here, the case remained to be tried in the state trial court when it was brought to this Court. And in both cases, the outcome of the trial might have obviated any need to consider the First Amendment issue.

The Court in *Cox* nevertheless held that the decision of the state courts was final and reviewable. In so holding, the Court emphasized that review in this Court would likely dispose of the entire action. Failing review, an important First Amendment issue would remain unresolved, forcing broadcasters in the future to act at their peril.

The same is true here. If review is denied by this Court, it will be several years before this case, or a similar case encouraged by the decision below, works its way again to this Court. It is apparent that similar tort actions alleging imitation will be brought during this time.[9] Failure to review this case at this juncture, there-

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tution, that holding unavoidably imported a decision on the First Amendment issue. The Court of Appeal necessarily, albeit implicitly, decided that the First Amendment did not bar a tort action based on a theory of imitation. The First Amendment question, therefore, is properly presented here. *See Radio Station WOW* v. *Johnson*, 326 U.S. 120, 127-29 (1945); *Neilson* v. *Lagow*, 53 U.S. 98, 109 (1851). We note that respondent's reply brief does not argue or even suggest that the First Amendment question is not properly before this Court.

[9] Indeed, respondent's suit is the first of two actions that have already been brought against petitioner NBC under essentially the same theory. *See Kane* v. *National Broadcasting Co.*, No. 77 Civ.

fore, will perpetuate the inhibitory effects of the decision below.

Those inhibitory effects are substantial. It requires little discussion to appreciate the broad reach of the tort theory advanced. The theory is not limited to liability for ideas contained in certain types of television programs. Injuries inflicted by third persons in pursuit of ideas gleaned from all types of programming, including a news report of a crime or a documentary on aircraft hijacking, detective shows, westerns, serious dramatic programs such as "I, Claudius" or "The Autobiography of Miss Jane Pittman," or even comedy programs, could become the subject of civil actions against broadcasters under respondent's theory. Moreover, given the variety of possible aberrational behavior, virtually any program or scene on television, violent or otherwise, could provide the idea for the commission of an injurious act. Thus the broadcaster would be required to broadcast all programming at a substantial risk. Moreover, the imitation theory is not limited in application to the broadcast media. A disturbed person may react to any form of communication in a harmful manner.

As this Court observed in the *New York Times* case, civil tort actions, by their nature, contain great potential for suppressing free speech—perhaps even more than criminal restraints. Damage awards may far exceed criminal fines. Criminal law safeguards such as the requirement of an indictment and proof beyond a reasonable doubt are absent in tort actions. And liability for injury need be established merely by a preponderance of the evidence. Thus the incipient tort of imitation threat-

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1193 (JMC) (S.D.N.Y. filed March 11, 1977). In addition, the Florida murder trial of Ronald Zamora, who claimed he killed because of insanity brought on by constant television watching, has achieved notoriety, and a recent newspaper article reports an instance where the idea for a murder was allegedly inspired by the television series "Kojak." N.Y. Post, March 30, 1978, at 17.

ens " 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' " *Id.* at 278, quoting *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963).

Under respondent's tort theory, broadcasters and other publishers will be required to act at the great peril of being required to pay, or at least defend against paying, staggering sums of money for injuries caused by persons, no matter how depraved, who allegedly obtained the idea for their malevolent acts from some communication made available to the general public. This would be true even though there was no intent to bring about injury. Under these circumstances, self-censorship would be substantially encouraged; the exercise of First Amendment rights of broadcasters, publishers and authors to communicate news and ideas to the general public would be markedly inhibited. At least as much as the libel actions involved in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 278 (1964), "the pall of fear and timidity imposed" by the tort of imitation would create "an atmosphere in which the First Amendment freedoms cannot survive."

The *in terrorem* effects of respondent's tort theory would in many instances restrain the presentation of material, including news reports, that serves to focus community attention on abuses and deficiencies in our society. Such material often plays an important role in the political process by fostering public debate on social problems. The Founding Fathers fully recognized that some degree of risk was involved in allowing that freedom of expression essential to the functioning of a democratic society. Yet those risks were willingly assumed "in order to preserve higher values." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 125 (1973).

As the Court noted in another recent case holding a judgment of a state court to be final because of First Amendment considerations:

> "[I]t would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the law] could only further harm the operation of a free press." *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974).[10]

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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[10] *See also Mills* v. *Alabama*, 384 U.S. 214, 221-22 (1966) (Douglas, J., concurring).

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1308

NATIONAL BROADCASTING COMPANY, INC., AND CHRONICLE PUBLISHING CO.,

Petitioners,

vs.

OLIVIA NIEMI, A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM,

Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT.

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Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT.

Amicus Curiae, American Library Association (ALA), respectfully requests that the Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, filed by Petitioners, National Broadcasting Company (NBC) and Chronicle Publishing Co. (Chronicle) be granted. Petitioners NBC and Chronicle and Respondent, Olivia Niemi, have all consented to the filing of this request and brief in support thereof.

IDENTITY OF THE AMERICAN LIBRARY ASSOCIATION.

The American Library Association, founded in 1876, is a non-profit educational organization with its principal place of business in Chicago, Illinois. Its membership includes more than 30,000 libraries, librarians, library trustees and members of the general public who are devoted to the development and improvement of library services in the United States.

The Association is the chief spokesman for the modern library movement in North America and, to a considerable extent, throughout the world. Through its membership and its affiliation with its constituent state library associations, the American Library Association represents over 29,000 public, university, and special libraries, over 90,000 elementary and secondary school libraries and media centers, and over 120,000 librarians.

The American Library Association is an institution unique to American culture and tradition. Through libraries, citizens are provided essentially free access to books, periodicals, magazines, records, microfilms, pamphlets, films, and other materials which they require or desire to satisfy their intellectual, emotional, recreational or professional interests.

In providing this service in the free society mandated by our Constitution, it is and has been the responsibility of libraries to make available books and other materials presenting all points of view concerning the problems, issues and attitudes of the times. Libraries and librarians have, therefore, historically resisted efforts to limit their collections to only those materials reflecting attitudes, ideas, and literary styles bearing the imprimatur of governmental authority or the approval of the prevailing majority of the populace. As a result, the American library has become, in many respects, the nation's most basic First Amendment institution. Indeed, libraries serve as a primary resource for the intellectual freedom required for the preservation of a free society and a creative culture.

INTEREST OF THE AMERICAN LIBRARY ASSOCIATION.

The interest of the ALA in this cause is direct, vital and immediate. Beyond any question, the outcome of this litigation will directly affect book selection and dissemination policies and practices of libraries both in California and throughout the United States. As a consequence, it will largely determine not only the future nature and content of library collections but also the terms and conditions of access to such collections.

Every day libraries and librarians disseminate literally millions of articles, books, phonorecords, photographs, films and audiovisual materials; through interlibrary loan arrangements, materials unavailable in one library collection can be obtained from another library collection; libraries do not and, in many cases legally may not, deny public access to those works in their collection which are desired or needed.

The works in library collections necessarily include works describing or depicting violent and criminal conduct. The history of man since Cain slew Abel is in no small measure a history of crimes against individuals, against families, against nations, and against humanity. Thus, it is inevitable that the records of such history, written and pictorial, are replete with scenes of rapine, murder, and mayhem.

Through the ages even the revered and renowned giants of literature have been recorders of violence and crime. Homer, Shakespeare, Dostoyevsky, Poe, and other authors without number have found the depiction of violence and crime a means of describing reality, or human problems, or moral lessons, or social insights; a means, too, of providing suspense, entertainment, and information.

It is the existence of these works and the creation of future works which is challenged by the theory of negligence advanced by Respondent. If the decision of the Court of Appeal

holding that the distributor of a creative work can be held liable because a person used such work as a pattern for criminal or anti-social behavior, then libraries must close down and education must cease. The evil of the Respondent's position is not merely in its application to violence and crime, but in its easy extension to every form of learning. There is no idea that cannot be perverted; there is no invention which cannot be misused.

It is not possible for librarians, or for that matter any other distributors of creative material, to psychologically screen their patrons to identify those whose latent criminal or anti-social inclinations will be triggered by a book or picture. Since patrons cannot be screened, if distributors of creative works are to be held liable for the effects of the contents of the works they distribute, they can only protect themselves by screening the works themselves. And the screening of such works on such basis is "censorship," plain and simple. Moreover, it is the most insidious form of censorship—self-censorship—which provides no basis for review and hence no means whereby the legal rights of those offended may be vindicated. *Smith* v. *California*, 361 U. S. 147, 154 (1959).

The concern of the American Library Association and its members with the issue here involved is not academic. Libraries are constantly under pressure to purge their collections of works which are deemed "unsuitable" by self-appointed, self-annointed, self-selected, and self-elected arbiters of the public welfare and morality. The addition of potential liability for civil damages to the existing pressures would make those pressures irresistible.

This cannot be permitted to happen if the Freedom of Speech guaranteed by the First Amendment is to have meaning.

ARGUMENT.

I.

Introduction.

The essence of Respondent's theory of liability is that the author, producer, distributor, and all sponsors of a creative work which involves a depiction of violence or crime are responsible in damages for any and all injury caused by any person's criminal response to such work. Such liability would follow even though there was no *scienter* or intent that the work should evoke such response. Such liability would be imposed even though the affirmative intent and the purpose of the work was to discourage such response. Moreover, such liability would arise even though the response is not one which a normal, reasonable person would have.

The net effect of Respondent's theory of liability is to compel the authors, producers, distributors, and sponsors of a creative work to underwrite losses resulting from the criminal conduct of any person whose crime can be said to resemble a scene or theme in such work, real or fictional. Since essentially every criminal act and every form a crime may take has been described in the media at some time, the damages incurred by any victim could readily be attributed to such description.

If, applying Respondent's theory, Petitioners' should have anticipated that an "artificial rape" scene in a work concerned with the social problems of reform school life would prompt a criminal assault on the Respondent, then the media's liability for losses through criminal activity is comprehensive and absolute. Victims of kidnappings, hijackings, bank robberies, extortion, murder, and every other form of violent, antisocial, and criminal behavior could enjoy indemnification if the wrongdoer can merely be persuaded to blame his crime on something he read, or heard, or saw.

The rationale of Respondent's theory involves a view of human behavior, motivation, and response which is completely "reactive"; that is, a belief that whatever man sees, hears, or reads he will do, even if the doing involves antisocial or criminal activity.

Fortunately, the authors of our Constitution did not share this hopeless, cynical, and aboriginal view of man's ability to cope with ideas, concepts, and images. Had they believed in Respondent's "monkey see, monkey do" view of human behavior, they would never have dared adopt the First Amendment.

The First Amendment, guaranteeing the freedom of speech as a fundamental right, is premised on a belief in man's power to reason; on his ability to filter the impressions and images received from whatever source and to determine which may be acted upon in a socially responsible way. To be sure, this belief and reliance on the reasoning power of man can involve risks and dangers of misconduct and disorder where such power is deficient. Yet, freedom of speech is willingly accepted as a well calculated risk because the Founding Fathers knew:

> ". . . that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *Whitney* v. *California,* 274 U. S. 352, 375 (1927).

The First Amendment was not designed to protect only that speech which is fit for psychopaths to hear; it was not intended ". . . to reduce the adult population * * * to reading only what is fit for children . . .," *Butler* v. *Michigan,* 352 U. S. 380, 383 (1956), or as in the case at bar, for "delinquent children." It was intended rather to protect and encourage the ". . . unfettered interchange of ideas for the bringing about of political

and social changes desired by the people." *Roth* v. *United States,* 354 U. S. 476, 484 (1957).

The First Amendment is not the product of a paternalistic society which believes that the only way citizens can find their self-interest is to deny them information deemed false or dangerous. *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U. S. 85 (1977). The First Amendment involves a fundamental value judgment that "the fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression." *Whitney, supra,* 274 U. S. at 378. In the words of Mr. Justice Brandeis: ". . . among free men the deterrents ordinarily to be applied to prevent crime are *education* and *punishment* for violation of the law, not abridgment of the rights of free speech and assembly." *Id.,* 274 U. S. at 378 [Emphasis supplied].

II.

Respondent's Theory of Liability Would Unreasonably Chill the Exercise of First Amendment Rights.

This Court has long been concerned with "the hazard of self-censorship of constitutionally protected material . . ." *Mishkin* v. *State of New York,* 383 U. S. 502, 511 (1966). It has recognized that the mere threat of criminal prosecution may be sufficient to prohibit the circulation of constitutionally protected publications. As this Court stated in *Bantam Books* v. *Sullivan,* 372 U. S. 58, 68 (1962).

> "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . ."

As a consequence, this Court has enjoined a number of threats by chiefs of police and prosecutors, *Id.* at 67, n. 8, recognizing that the threat of invoking legal sanctions and other means of

coercion, persuasion, and intimidation were effective but informal means of violating First Amendment rights.

It is the very invisibility of self-censorship to those whose freedoms are denied by it which presents a special hazard. As Mr. Justice Brennan so aptly wrote in *Smith* v. *California, supra,* 361 U. S. at 154:

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered."

But this Court not only has condemned the self-censorship prompted by the threat of criminal prosecution, fine and imprisonment, it has also specifically recognized the inhibitory effect of civil liability on the freedom of speech. In fact, this Court noted in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 277 (1964) that

> "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."

and went on to explain that:

> "Whether or not a newspaper can survive a succession of such judgments [civil], the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment Freedom cannot survive." *Id.* at 278.

It is manifest that if every crime which resembles a crime depicted on television, in the movies, or in print can provide the basis for a civil suit by the victim against the media, then every report of crime, real or fictional, must be expunged or suppressed in the interest of economic survival. The media simply could not afford to defend themselves under such circumstances regardless of the merits of the case.

Publishers and broadcasters, and librarians too, do not exist to indemnify the victims of criminals who choose to copy conduct described or depicted in books, movies, and television.

Nor do they exist to engage in litigation with those victims. To make the media liable in damages for the "copycat" criminal is to compel comprehensive self-censorship.

Respondent suggests, at least by implication, that her theory of liability would be limited primarily to television presentations and then only to dramatic as opposed to news and informational materials.

We suggest that no such limitations are constitutionally permissible.

In today's world the "medium may be the message," but there is no authority recognizing the "medium as the measure" of First Amendment rights. The right of free speech is protected from infringement whether that right is exercised by newspapers, *New York Times* v. *Sullivan, supra,* 376 U. S. 254; by magazines, *Winters* v. *New York,* 333 U. S. 507 (1947); by radio, *Rosenbloom* v. *Metro Media, Inc.,* 403 U. S. 29 (1971); by motion picture, *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43 (1961); or by television, *American Broadcasting Co.* v. *United States,* 110 F. Supp. 374, 389 (SD NY 1953) *aff'd., FCC* v. *American Broadcasting Co., Inc.,* 347 U. S. 284 (1953).

Moreover, the degree of protection afforded the various media of communication must be the same. The contention has been advanced that the greater the impact of the media used the greater should be the restrictions on First Amendment rights. Chief Justice Warren, dissenting in *Times Film Corp.* v. *Chicago, supra,* 365 U. S. 43, 77, answered this contention in the following words:

> ". . . But even if the impact of the motion picture is greater than that of other media, that fact constitutes no basis for the argument that motion pictures should be subject to greater suppression. This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected

> in England, and has been consistently held contrary to our Constitution." c.f. *Illinois Citizens Committee for Broadcast* v. *FCC*, 515 F. 2d 397, 421 (D. C. Cir. 1975)

To vary the degree of freedom of speech inversely with the impact of the medium used would produce the anomalous result that the man "who talks to himself" would be afforded the broadest protection under the First Amendment. Clearly, the protection of the right "to talk to one's self" is not the purpose of the First Amendment. On the contrary, if the purpose of the First Amendment is to promote debate on public issues which is ". . . uninhibited, robust, and wide-open . . ." *New York Times, supra,* 376 U. S. at 270, the purpose is best served by the medium with the greatest audience and impact.

Yet, the greater the audience, the greater the possibility that some psychologically imbalanced member of that audience will abuse, misuse, or pervert some thought, idea, or depiction. Thus, the "chilling effect" of Respondent's theory of liability increases directly with the effectiveness of the communications medium.

Likewise, it is not impossible for Respondent's theory of liability to apply to "fiction" but be inapplicable to "fact." Creative works as well as news and informational materials are equally protected by the First Amendment. As this Court noted in *Winters* v. *New York,* 333 U. S. 507, 510 (1947):

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

There is yet another way in which Respondent's theory of liability would operate to chill the exercise of First Amendment rights. Respondent's theory contemplates that the "sponsor" as well as the author, producer, and distributor of the offending work shall be held liable in damages.

However dedicated the author, producer, and distributor of a work to its dissemination, however committed they are to its defense as constitutionally protected, it would be rare to find the same degree of dedication and commitment in the sponsor. The stake of any individual advertiser in the sponsorship of any particular work is too limited to justify his acceptance of any significant risk arising out of its performance or content. It is far too easy to avoid such risk by sponsoring "safe programs."

But without sponsors, works will not be authored, produced, and distributed. By discouraging sponsorship, Respondent's theory of liability operates not merely to suppress creative works but to deny their creation at all.

The purposes of the First Amendment are not served by the over-subscription of *Winnie the Pooh* and *Goodie Two Shoes* at the expense of the themes and scenes of our times, however violent they may be.

III.

The Standard of Conduct Required by Respondent's Theory of Liability Is So Vague and Indefinite as To Be Constitutionally Impermissible.

Respondent seeks to establish here that the mere origination, production, distribution, and sponsorship of a creative work depicting violent or criminal behavior is a "negligent" act. To Respondent, the depiction of violence and crime, in and of itself and without reference to the context in which the depiction occurs, is sufficient to impose liability for any injury caused by any "copycat" criminal; *res ispa loquitor*.

The theory of liability advanced by Respondent is not new. It closely resembles that rationale used to justify the enactment of those statutes and ordinances which made it a crime to publish any work ". . . principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime . . ." *Winters* v. *New*

York, supra, 333 U. S. at 508. That rationale was "spelled out" by Mr. Justice Frankfurter in his dissent in the *Winters* case in these words:

> "Whereas, we believe that the destructive and adventurous potentialities of boys and adolescents, and of adults of weak character or those leading a drab existence are often stimulated by collections of pictures and stories of criminal deeds of bloodshed or lust so massed as to incite to violent and depraved crimes against the person; and
>
> "Whereas, we believe that such juveniles and other susceptible characters do in fact commit such crimes at least partly because incited to do so by such publications, the purpose of which is to exploit such susceptible characters; and
>
> "Whereas, such belief, even though not capable of statistical demonstration, is supported by our experience as well as by the opinions of some specialists qualified to express opinions regarding criminal psychology and not disproved by others; and
>
> "Whereas, in any event there is nothing of possible value to society in such publications, so that there is no gain to the State, whether in edification or enlightenment or amusement or good of any kind; and
>
> "Whereas, the possibility of harm by restricting free utterance through harmless publications is too remote and too negligible a consequence of dealing with the evil publications with which we are here concerned;
>
> "Be it therefore enacted that—" *Winters* v. *New York, supra,* 333 U. S. at 530.

But notwithstanding the rationale articulated by Justice Frankfurter, this Court held the New York statute which was the subject of the *Winters* case unconstitutional as "so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech . . ." *Id.* at 509. The *Winters* decision not only abrogated the New York statute in question, but struck down similar statutes in at least nineteen other states. *Id.* at 520, 522-523.

This Court was then, as it should be here, deeply concerned with the absence of any ascertainable standard of guilt. As was noted in this regard:

> "Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted, . . . *we think fair use of collections of pictures and stories would be interdicted* because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications." *Winters* v. *New York, supra,* 333 U. S. at 519 [Emphasis supplied].

This Court went on to detail the specific defects of the "standard of guilt" as follows:

> "No intent or purpose is required—no indecency or obscenity in any sense heretofore known to the law. 'So massed as to incite to crime' can become meaningful only by concrete instances. This one example is not enough. The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crimes of violence against the person. No conspiracy to commit a crime is required." *Id.* at 519.

The decision in the *Winters* case is particularly significant in the consideration of Respondent's theory of liability here. In fundamental terms, Respondent is asking this Court to adopt by judicial fiat the very theory of liability which this Court precluded the legislatures of at least twenty states from adopting.

Moreover, Respondent is asking this Court to adopt a theory of liability applicable not merely to depictions "so massed as to incite crime" but also to every depiction of crime or violence, however isolated or limited in the context of the total work.

It is no answer to the *Winters* decision that it involved a criminal prosecution whereas this action involves a civil suit for damages.

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. * * * These freedoms are delicate and vulnerable, as well as supremely precious in our society. *The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." National Assn. for the Advancement of Colored People* v. *Button,* 371 U. S. 415, 433 (1962) [Emphasis supplied].

As we have already noted, this Court is on record as recognizing the threat of damage awards as a form of sanction as effective in inhibiting the exercise of First Amendment rights as the threat of criminal prosecution. *New York Times Co., supra,* 376 U. S. at 277.

Limitations on First Amendment rights have been recognized by the Supreme Court. But whether such limitations have been labeled contempt, libel, obscenity, misrepresentation, slander, perjury, false advertising, solicitation of crime, or conspiracy, their nature and scope have been defined by standards that satisfy the First Amendment. *Id.* at 269.

No limitation on First Amendment rights heretofore recognized has involved the imposition of vicarious liability for utterances, oral, printed, or visual. Vicarious liability for the unintended and uncontrollable response of a third party to what is said, written, or shown, must necessarily result in comprehensive self-censorship.

"Intent" or "scienter" or "malice" is consistently required in cases involving First Amendment rights to avoid vicarious liability. The purposes of the *"scienter"* requirement were defined by the Supreme Court in *Mishkin* v. *State of New York,* 383 U. S. 502, 511 (1966) in the following terms:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material . . ."

It avoids this hazard, at least in one respect, by equating "responsibility" with "authority." Imposing liability on the perjurer for his false swearing; on the libeler for his libels; on the conspirator for his conspiracy; on the advertiser for his misrepresentations; at least makes the "doer" responsible for his "deeds."

The same cannot be said for imposing absolute liability for the response of a third party to the depiction or description of violence or crime. Such response would create a liability ". . . the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Winters* v. *New York, supra,* 333 U. S. at 519, quoting *U. S.* v. *Cohen Grocery Co.,* 255 U. S. 81, 89 (1921).

To avoid the hazard of self-censorship of constitutionally protected materials, it must be possible to avoid civil as well as criminal liability without suppressing such materials. To avoid liability it must therefore be possible to identify materials which are not constitutionally protected.

This means that Respondent's theory of liability requires either

1. That all materials depicting violence and crime, in any form and under any circumstances, be deprived of any guarantees of the First Amendment; or

2. That any materials depicting violence and crime which evoke criminal behavior in another be unprotected and properly the subject of suppression.

The *Winters* case forecloses absolutely any consideration of the first proposition.

On the other hand, the alternative would mean that the works entitled to constitutional protection could not be identified until the response to them is known and it is too late to avoid liability. A standard which requires knowledge of the effect of a work in order to determine whether it is constitutionally protected is a standard which not only encourages self-

censorship but absolutely compels it as the only alternative to unforeseeable and uncontrollable litigation and liability.

IV.

The Decision of the Court of Appeal Compels Comprehensive Self-Censorship.

If, as the decision of the Court of Appeal holds, there must be a jury trial before the trial judge may consider whether or not the work is constitutionally protected, then the exercise of First Amendment rights has been effectively limited if it has not been abrogated altogether.

The mere cost of preparing a defense is a significant deterrent to dissemination and distribution. This is particularly true in the case of works distributed by libraries where there is no prospect of profit or income from which defense costs may be defrayed.

Confronted with a suit of the type involved here, the response of libraries, schools, and other distributors of works is wholly predictible—

> First, they would accept settlement of the suit at any sum less than their cost of defense; and
>
> Second, they would limit the works they distribute to those which are "safe" so as to avoid further litigation.

Thus, the effect of the procedure mandated by the decision of the Court of Appeal will be comprehensive self-censorship of constitutionally protected works in the interest of economic survival.

V.

The Decision of the Court of Appeal Is Properly Reviewable by This Court at This Time.

Amicus ALA adopts as its own the arguments and authorities set forth in Petitioners' Statement of Reasons for Granting the Writ of Certiorari at this time rather than after further proceedings.

Such reasons are consistent with and in amplification of Amicus' contention that the essence of the evil in Respondent's theory of liability is the "chilling effect" of "further proceedings." The rule of law is ill-served when it is made an instrument of legalized harassment, coercion, and oppression. Yet this is precisely the consequence of requiring a full trial of a contention barred by the First Amendment.

VI.

Conclusion.

Librarians and libraries would be the last to deny the force of an idea; the influence of an image, and the power of a picture. They exist to preserve such force, influence, and power so that man may use them.

Nor would librarians or libraries deny that such force, influence, and power as are available in the words and pictures they disseminate can be abused and misused. They would agree with President Madison that:

> "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." 4 Elliott's Debates on the Federal Constitution (1876) p. 571

And yet, silence coerced by law is the argument of force in its worst form. *Whitney* v. *California, supra,* 274 U. S. at 376. And the "argument of force" is tyranny.

Librarians abhor violence and crime. But to abhor it does not permit it to be ignored as a part of life or as a part of literature.

Amicus respectfully submits that this Honorable Court should grant Petitioners' Request for a Writ of Certiorari.

Respectfully submitted,

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IN THE

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NATIONAL BROADCASTING COMPANY, INC. and CHRONICLE PUBLISHING CO.,

Petitioners,

vs.

OLIVIA NIEMI, a minor by and through her guardian Ad Litem,

Respondent.

Brief of the California Broadcasters' Association as Amicus Curiae in Support of the Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District.

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SUBJECT INDEX

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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1308

NATIONAL BROADCASTING COMPANY, INC. and CHRONICLE PUBLISHING CO.,

Petitioners,

vs.

OLIVIA NIEMI, a minor by and through her guardian Ad Litem,

Respondent.

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I.

Interest of California Broadcasters' Association.

The California Broadcasters' Association (herein "CBA") is a non-profit California corporation composed of licensees of California radio (both AM and FM stations) and television stations. The CBA has participated in rule making and decisional proceedings before the Federal Communications Commission; it has likewise appeared and represented the broadcast industry before the Federal and State Courts, state and municipal regulatory agencies. The CBA's interest in matters affecting the broadcast industry is well known to the Courts.

In this case, the respondent seeks to recover substantial damages against a broadcaster which did nothing more than show a feature film on the ground that some adolescents who did not see the film allegedly "imitated" one of the scenes contained in the film. The threat of liability and exposure to litigation from multiple litigants would curtail the broadcast industry's First Amendment rights by chilling and impairing the free expression of ideas. It would result in substantial injury to the public interest.

The CBA has a substantial interest in the preservation of the First Amendment rights of the broadcast industry. It is thoroughly familiar with the questions involved in this case. It previously filed a petition seeking leave to file a memorandum brief *amicus curiae* in this matter with the Superior Court in and for the City and County of San Francisco. It filed a brief as *amicus curiae* in the Court of Appeal. It requested permission to file brief and petition for hearing in the Supreme Court of the State of California.

Accordingly, the CBA has a vital interest in seeking review of the lower court's decision which if left undisturbed would subject broadcast stations to the risk of civil damage awards—unlimited in amount and unpredictable in occurrence—as the price of exercising First Amendment rights.

Respondent and petitioners have consented to the filing of this brief and such consent has been filed with the Clerk of this Court.

II.
The Facts.

The facts are derived from Petitioners' Trial Memorandum in the Superior Court.

On September 10, 1974, petitioners telecast a two-hour motion picture entitled "Born Innocent." This was a serious award-winning drama about the harmful effect of "reform school" on one adolescent girl

Respondent claims that on September 14, 1974, she was attacked by third persons and injured as a direct and proximate result of that television program. More specifically, respondent contends that her assailants "got the idea" from viewing the program to insert a beer bottle into her vagina and that it was negligent of the petitioners not to have foreseen this result. (Appendix G, 17a-24a.)

This matter was heard before the Honorable John A. Ertola, who viewed the program to determine whether it was protected by the First Amendment of the United States Constitution and Article I, Section 2 of the Constitution of the State of California. (Appendix D, 10a.)

Judge Ertola granted judgment for the petitioners on the pleadings. (Appendix E, 13a.)

The Court entered the following findings of fact and conclusions of law:

"FINDINGS OF FACT

1. Said motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action.

CONCLUSIONS OF LAW

1. Assuming plaintiff's assailants obtained the idea of assaulting her as a result of the telecast of said motion picture, and assuming the other facts alleged in the Complaint and offered to be proved by plaintiff to be true, the law provides no remedy.

2. Plaintiff's alleged causes of action, and each of them, are barred by the First Amendment to the United States Constitution and Article I, Section 2, of the California Constitution.

3. Said motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action." (Appendix F, 16a.)

Judge Ertola in his decision (Appendix D, 10a-12a) had concluded that "Born Innocent" was absolutely privileged under the First Amendment; the Court had invoked the doctrine of "constitutional fact" in ruling on this issue. *Cf. Rosenbloom v. Metromedia, Inc.* (1971) 403 U.S. 29, 54, 29 L.Ed.2d 296.

The Court of Appeals in reversing the lower Court acknowledged the applicability of the "constitutional fact" doctrine of *Rosenbloom, supra,* but stated that

> "the case is not presently ripe for such a determination, appellant having been deprived of her constitutional right to present before a jury evidence she contends will show that despite First Amendment protections, the showing of the film 'Born Innocent' resulted in actionable injuries." (Appendix A, 6a.)

There is a patent inconsistency in the lower Court's opinion on the applicability of the *Rosenbloom* consti-

tutional fact doctrine. The requirement of a jury trial for respondent would impair and curtail the First Amendment rights of the petitioners.

III.

Question Presented.

The issue tendered by this litigation must be viewed from the following factual perspective. To quote from Mr. Justice Brennan's dissenting opinion in *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973):

> "Moreover, it is equally clear that, with the assistance of the Federal Government, the broadcast industry has become what is potentially the most efficient and effective 'marketplace of ideas' ever devised. Indeed, the electronic media are today 'the public primary source of information,' and we have ourselves recognized that broadcast 'technology . . . supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news . . .' Red Lion Broadcasting Co. v. FCC, supra, at 386 n. 15. Thus, although 'full and free discussion' of ideas may have been a reality in the heyday of political pamphleteering, modern technological developments in the field of communications have made the soapbox orator and the leafleteer virtually obsolete. And, in light of the current dominance of the electronic media as the most effective means of reaching the public, any policy that absolutely denies citizens access to the airways necessarily renders even the concept of 'full and free discussion' practically meaningless . . ."

Thus, the issue tendered is as follows:

To what extent does the First Amendment protect the "marketplace of ideas" communicated by the broadcast industry against the civil claims of litigants who contend that broadcasters are answerable in damages for the criminal acts of third parties, based solely on the prospect that a disturbed person "got the idea" from viewing a program on television?

IV.
Reasons for Granting the Writ.

A. Scope of the Problem.

The issue tendered by this case is not limited to "Born Innocent," a dramatic television presentation but it extends to news programs, documentaries and commercials, all of which are protected by the First Amendment. See *Miller v. California* (1973) 413 U.S. 15, 37 L.Ed.2d 419; *Kingsley v. International Pictures Corp. v. Regents of New York* (1959) 360 U.S. 684, 3 L.Ed.2d 1512 (motion pictures); *New York Times v. Sullivan* (1964) 376 U.S. 254, 11 L.Ed.2d 686 (newspapers); *Bigelow v. Commonwealth of Virginia* (1975) 421 U.S. 809, 44 L.Ed.2d 600; *Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc.* (1976) 425 U.S. 748, 48 L.Ed.2d 346 (commercial advertising).

It is hornbook law that "Publications containing criminal news, accounts of criminal deeds, or pictures and stories of bloodshed, lust, or crime are as much entitled to the protection of free speech as other literature." (*Winters v. New York*, 333 U.S. 507, 510 [68 S.Ct. 665, 92 L.Ed. 840], quoted in *Katev v. County of Los Angeles*, 52 Cal.2d 360, 365, 341 P.2d 310 (1959).)

If liability exists in the case at bar, it extends to news programs, documentaries and commercial matter.

News is a staple fare of the broadcast industry; it has been described as ". . . that indefinable quality of interest which attracts public attention" or as a "report of recent occurrence." *Sweenek v. Pathe News, Inc.*, 16 F.Supp. 746 (D.C. N.Y. 1936); *Sutton v. Hearst Corp.*, 277 App.Div. 155, 98 N.Y.S.2d 253 (1950).

If the respondent prevails in the instant case, the broadcast industry is vulnerable to litigation in the following instances:

(a) A radio or television station in its newscasts reports a kidnapping and a demand for ransom. This prompts an increase in the number of kidnappings with increased ransom demands. A kidnapper is apprehended after he has injured a victim. The broadcast industry is sued because the assailant who has been apprehended claims that he "got the idea" from radio and television broadcasts.

(b) Acts of terrorism where innocent citizens held as hostages, accounts of criminal deeds such as murder, arson, robbery, etc.,—all are reported by the broadcast media as news events. A teenager claims that he was induced to engage in criminal conduct injuring third persons because the broadcast media reported the same. A radio or television station reports a suicide occurring on the Golden Gate Bridge. The executor of the estate contends that the news reports by the broadcast industry caused decedent's death. If the rule of liability prevails in the instant case, then all stations would be extremely reluctant to engage in any form of news reporting which would expose them to civil liability.

(c) Sponsors of programs would likewise be exposed to liability. Thus, the current television commercial of the sword swallower who uses a brand name medication to soothe his throat may prompt imitators to invoke the jurisdiction of the Courts claiming that the catalyst for the injury was the television commercial. Another illustration is the commercial where a car is tested by a non-professional driver on a race track or on an open road. A teenager is injured; he claims that the television commercial prompted him to imitate the non-professional driver.

The foregoing illustrations, whether in the areas of dramatic presentations, news and documentaries and commercials can be readily multiplied. And if the respondent's claim in this case prevails, the broadcast industry will be inundated with lawsuits.

B. The First Amendment Protects the "Market Place of Ideas" Communicated by the Broadcast Industry.

If the broadcast industry cannot invoke the First Amendment as a defense against respondent's claim, it will be vulnerable to a plethora of lawsuits. The extent of this litigation and the burdens that it would impose on the broadcast industry and the Courts are horrendous.

The claim asserted by the respondent in the instant case would have a "chilling effect" on the First Amendment rights of the broadcast industry. *Laird v. Tatum* (1972) 408 U.S. 1, 32 L.Ed.2d 154 (1972); *Banzaf v. FCC*, 405 F.2d 1082, 1101-1102 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

The following from *New York Times v. Sullivan, supra*, a defamation case, is particularly appropriate:

"What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. *The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting that the fear of prosecution under a criminal statute.* See *City of Chicago v. Tribune Co.* 307 Ill. 595, 607, 139 NE 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution any 'person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude,' and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit.14, §350. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded petitioners for the same publication. *Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to*

> *public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 9 L.Ed.2d 584, 593, 83 S.Ct. 631." (376 U.S. at 277-78, 11 L.Ed.2d at 705, footnotes omitted and italics ours).

This principle of the *New York Times* case has been reaffirmed many, many times. See *e.g., Time, Inc. v. Firestone,* 424 U.S. 448, 47 L.Ed.2d 444 (1976).

The application of the principle to the claim asserted by respondent would destroy the journalistic discretion of the news departments of radio and television broadcast stations. News editors would be reluctant to report criminal news, accounts of criminal deeds or any other news events which could expose the broadcast industry to civil liability.

The smaller radio stations whose total complement of personnel ranges from five to ten employees would be particularly vulnerable. How can any news reporter whose primary objective is to report the news accurately and as quickly as possible make the requisite judgment that the broadcast of a news event may or may not expose the station to civil liability?

All radio and television stations file applications for renewal of license with the Federal Communications Commission every three years. California licensees

were required to file by August 1 of 1977. The application form requires licensees to specify the amount and percentage of time devoted to news and public affairs programming, etc. Thus, the licensee makes representations to the FCC as to its proposed programming and the Commission expects licensees to comply with such representations.

The smaller stations generally represent that they carry from five per cent (5%) to ten per cent (10%) news programming. Of this percentage of news programming, the Commission inquires as to the amount of local or community news to be carried. The Federal Communications Commission has repeatedly urged licensees as part of their obligation to serve the public interest, convenience and necessity to broadcast "local" news. If the claim of the respondent prevails, there will be a diminution in the reporting of local news and the news furnished by the wire services; and licensees will have to explain to the Commission that they cannot discharge their obligations in the public interest in reporting local and other news because of their possible exposure to civil liability.

Advertisers and sponsors would be required to scrutinize commercial copy to insure that they would not be exposed to civil liability. Advertising has been described as the life-blood of the broadcast industry. Respondent's claim, if upheld, could seriously impair advertising and with it the structure of the broadcast industry.

V.
Conclusion.

For the reasons set forth above, the CBA joins in the request of petitioners that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal.

Dated: April 13, 1978.

Respectfully submitted,

HARRY P. WARNER,
Attorney for California Broadcasters' Association.

Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

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AMICUS CURIAE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF AMICUS CURIAE, CALIFORNIA MEDICAL ASSOCIATION

California Medical Association is a non-profit unincorporated association consisting of a membership of over 27,000 physicians and surgeons from throughout the State of California. It is the largest state medical association in the country.

California Medical Association and its members share a common objective of promoting good physical

and mental health. In furtherance of that objective, the physicians of the California Medical Association are concerned about the impact which violent television programs have on the mental and physical health of the young. Over 146 studies have shown TV violence to have serious harmful effects on the health of Americans, especially children. In this case a nine-year-old girl who suffered the traumatic consequences of violent television programming was denied her day in court by the trial judge. The California Court of Appeal properly reversed that decision. For the legal, social and medical reasons set forth herein, Amicus Curiae, California Medical Association, respectfully submits that certiorari should be denied in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the First and Fourteenth Amendments to the United States Constitution, which are set out *verbatim* in the Petition (pages 2-3), this case involves California's constitutional guarantee of the right to a jury trial in civil cases:

> Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.
>
> In civil causes and cases of misdemeanor the jury may consist of 12 or a lesser number agreed on by the parties in open court. (Calif. Const., art. I, §16.)

Also relevant to the Court's determination is California Civil Code Section 3523, which restates the common law principle that:

> For every wrong there is a remedy.

QUESTION PRESENTED

Does the First Amendment vest in broadcasters absolute immunity from civil accountability for the foreseeable results of a broadcast which created an undue risk of harm?

STATEMENT OF THE CASE

On September 10, 1974, at 8:00 p.m., NBC aired a made-for-television movie called "Born Innocent." In the opening minutes of that movie, television viewers, young and old, saw a violent and bizarre scene unfold before them: Linda Blair (a child actress who starred in "The Exorcist") was portraying a 15-year-old inmate in a school for wayward girls. As the scene opens, she is shown entering a community bathroom to take a shower. She is then shown taking off her clothes and stepping into the warm shower water, where she bathes for a few moments. Suddenly, the water stops and a look of fear comes onto her face. Four adolescent girls are standing across the shower room. One is carrying a plumber's helper, waving it suggestively by her hips. The older girls tell Ms.

Blair to get out of the shower. She steps out fearfully. Then the four girls violently attack the younger girl, wrestling her to the floor. She is shown naked from the waist up, struggling as the older girls force her legs apart. Then the girl with the plumber's helper is shown making intense thrusting motions with the handle of the plunger until one of the four says, "That's enough." The young girl is left sobbing and naked on the floor.

Three days later in San Francisco, on September 13, 1974, a nine-year-old girl was attacked by four adolescents (three girls ages 15, 14 and 11, and a boy aged 15), and was artificially raped with a bottle. The young attackers admitted to police that they were inspired to do this act by the movie "Born Innocent".

NBC presented this movie at an hour when much of the television audience is comprised of children. The network was clearly aware of the potentially youthful audience. It had expressly solicited the Disney Corporation as a sponsor. It also advertised and marketed the program in such a way as to encourage children to watch "Born Innocent." For example, NBC took out a two-page advertisement in TV Guide. On one page they advertised the Monday night movie, featuring the well-known story about lion cubs, "Born Free", while the flip side of the page encouraged the viewers to watch the Tuesday night movie at the same hour, "Born Innocent."

Now little Olivia Niemi, the nine-year-old victim of the San Francisco attack is suing NBC and KRON-TV. She has alleged negligence and intentional wrong-

ful conduct by the broadcasters in presenting this program which eventually led to the traumatic physical and mental harm inflicted on her. The defendants, however, argue that, as a matter of law, the First Amendment vests broadcasters with an absolute immunity from civil liability for foreseeable personal injuries arising out of their programming. Amicus Curiae, California Medical Association, believes that there is no such immunity under the First Amendment and that it is in the interest of the health of all Americans, especially our children, to hold broadcasters civilly accountable for acts which lead to foreseeable harm.

PROCEEDINGS BELOW

On October 9, 1974, Respondent filed a Complaint For Damages, alleging Petitioners' negligent and willful misconduct. (Appendix G to the Petition.) Like any other complaint for negligence it pled duty, breach, causation and damages, and added a separate count for willful or reckless misconduct.

Subsequently, Petitioners made a motion for summary judgment in which they asserted as a matter of law that broadcasters are immune under the First Amendment from liability for negligent or wrongful programming. (CT 42-65.) The Superior Court rejected that argument (CT 116) and the California Court of Appeal denied a Writ of Mandate seeking to overturn the trial court's determination (Appendix H to Petition).

On September 13, 1976, the case proceeded to trial, but before the first juror was impaneled, the trial judge asked to view the film. After seeing the film, and amidst some confusion, the trial judge ruled that the Plaintiff was barred from proceeding any further by the First Amendment and dismissed the entire action. The trial judge referred to his ruling as a judgment on the pleadings. (CT 184; RT 86.) At the time, however, he had viewed the film and had heard argument of a factual nature. (CT 183-185.) He also subsequently issued a document entitled "Findings of Fact and Conclusions of Law" (CT 187-187a). Such Findings would be procedurally inconsistent with a judgment on the pleadings, in which supposedly all well-pleaded facts are taken as true.

On October 26, 1977, the California Court of Appeal held that in his ruling the trial judge had committed "reversible error" and "had acted in excess of jurisdiction" in denying Plaintiff her right to a jury trial under California Constitution, Article I, section 16. (74 Cal. App. 3d at 389, 141 Cal. Rptr. at 514, Appendix A to Petition at 6a.) On November 7, 1977, the California Court of Appeal denied a Petition for Rehearing (Appendix B to Petition), and on January 19, 1978, the California Supreme Court declined to review the Appellate Court's ruling (Appendix C to Petition). Applications for a Stay of the Proceedings below have been denied both by the California Court of Appeal and by Justice Rehnquist (46 U.S.L.W. 3523). The matter is currently set for trial to commence on June 26, 1978.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE CALIFORNIA COURT OF APPEAL'S DECISION RESTS PRIMARILY UPON CALIFORNIA PROCEDURAL LAW AND THE CALIFORNIA CONSTITUTION.

Procedurally, the trial court was deemed acting "in excess of its jurisdiction" when it entered its "judgment on the pleadings." Under California law, in ruling on the pleadings, the trial judge is required to confine his consideration solely to the pleadings before him and treat all matters properly pleaded as true and indulge every inference therefrom in plaintiff's favor. (See, *Colberg, Inc. v. State of Calif. ex rel. Dept. Pub. Wks.*, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).)

Here, before the jury was impaneled, the trial judge took a portion of the defendants' evidence, i.e., the film, and made a ruling on the entire case. He later backed the ruling up by "Findings of *Fact* and Conclusions of Law." As noted, however, California procedural law prohibits any determination of facts on a motion for judgment on the pleadings. This procedural confusion caused Justice Rattigan of the California Court of Appeal to comment after NBC's oral argument, "I still don't understand what happened at the trial court level."

In denying Petitioners' application for stay in this matter, Justice Rehnquist observed:

> A reading of the opinion of the Court of Appeal indicates that it might have been based on a state procedural ground, by reason of the fact that the trial judge after denial of a motion for sum-

> mary judgment but before the empanelment of a jury himself viewed the entire film and rendered judgment for applicants because he found that it did not 'advocate or encourage violent and depraved acts and thus did not constitute an "incitement".' The Court of Appeal held that this was a violation of respondent's right to trial by jury guaranteed her by the California Constitution. . . . The contours of California tort law are regulated by the California courts and California Legislature, subject only to the limitations imposed on those bodies by the United States Constitution and laws and treaties enacted pursuant thereto. (46 U.S.L.W. 3523-24.)

The fact is that under California law there is no cognizable motion which would allow a judge, before impaneling a jury, to hear only part of one side of a case and then dismiss the entire action. The Appellate Court, therefore, properly reversed the trial court's decision, declaring that it was a denial of Plaintiff's right to jury trial under the State Constitution. (Calif. Const., art. I, §16.)

II. CERTIORARI SHOULD BE DENIED BECAUSE THE LACK OF AN EVIDENTIARY RECORD MAKES DETERMINATION OF CONSTITUTIONAL ISSUES PREMATURE.

In its decision, the California Court of Appeal observed:

> Here, it is appropriate to acknowledge that, if the cause had proceeded properly to trial before a jury and a verdict awarding damages to appellant had been the result, it would have been

> the responsibility of the trial court, or perhaps of this court on appeal, to determine upon a reevaluation of the evidence whether the jury's fact determination could be sustained against a First Amendment challenge to the jury's determination of a 'constitutional fact.' (*Rosenbloom v. Metromedia, supra,* 403 U.S. 29, 54, 91 S.Ct. 1811, 29 L.Ed. 2d 296.) But the case is not presently ripe for such a determination, appellant having been deprived of her constitutional right to present before a jury evidence which she contends will show that, despite First Amendment protections, the showing of the film, "Born Innocent," resulted in actionable injuries. (Cf. *Weirum v. RKO General, Inc.* (1975) 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36.) (74 Cal. App. 3d at 389-90, 141 Cal. Rptr. at 514, Appendix A at 6a.)

The procedural posture of this case brings it now to the United States Supreme Court without any evidentiary record—except for the film itself. Yet, this is a negligence action based not solely upon the content of the film but upon the acts and activities of the broadcasters in selecting the time for airing, the advertising for the program, etc. The issues of fact related to the broadcasters' duty, breach and causation (foreseeability) have not been established. It is possible, though not likely, that at the trial (which is now set to commence on June 26, 1978) Plaintiff will fail to prove one of these elements rendering the constitutional issues moot.

Finally, unless the Supreme Court is willing to declare that the First Amendment vests broadcasters

with absolute immunity from this kind of liability, the First Amendment would operate as a *qualified* privilege only, dependent upon the facts and circumstances surrounding the broadcast. None of the relevant factual information is before the Court at this time. So, in essence the Court is being asked to render an advisory opinion on the issue of absolute First Amendment immunity for broadcasters. As argued in the following sections of this brief, however, the granting of such immunity would be a gross violation of sound constitutional and social principles.

III. CERTIORARI SHOULD BE DENIED BECAUSE THE CONSTITUTIONAL ISSUE HAS ALREADY BEEN DECIDED BY THE CALIFORNIA SUPREME COURT.

The supposed constitutional issue of whether or not the First Amendment is a defense to a negligence action against broadcasters has already been decided in California. The California Supreme Court has expressly recognized that "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act." (*Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 48, 539 P.2d 36, 40, 123 Cal. Rptr. 468, 472 (1975).) In the *Weirum* case, the State Supreme Court upheld a verdict against a broadcaster for negligent programming.

Amicus Curiae submits that the issue in the *Weirum* case, as stated by the Court, and the issue in the present case are the same:

> The issue here is *civil accountability for the foreseeable results of a broadcast which created*

> *an undue risk of harm* . . . . (*Weirum* at p. 48.) (Emphasis added.)

The factual parallels in the *Weirum* case and the present case are so numerous that the *Weirum* case must be held to be dispositive:

(1) Both broadcasts were directed at a largely youthful audience;

(2) Both broadcasts led young people to act irresponsibly;

(3) Both broadcasts led to serious physical harm caused by the young people acting irresponsibly under the influence of the broadcast.

In the *Weirum* case, the Court specifically held that there was *no* First Amendment privilege, and thus upheld the verdict against the broadcaster. Any factual distinctions between the *Weirum* case and the present case go only to the question of foreseeability of harm—a question of fact for the jury to determine, not a question of law for the judge to decide based on a viewing of the film alone. Clearly, the applicability of *Weirum* to this case depends upon the development of the facts, but Plaintiff was wrongly denied her day in court. The decision of the Court of Appeal granting Plaintiff her day in court need not and should not be reversed.

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE HEALTH AND WELFARE OF OUR SOCIETY DEMANDS THAT BROADCASTERS BE ACCOUNTABLE FOR THEIR PROGRAMMING.

A. Scientific Studies To Date Have Shown Overwhelmingly That Television Is A Violent Medium.

Television invades the homes of nearly all Americans. Its programming clearly affects our way of life. It brings us in immediate contact with the world around us—and even beyond—as far away as the moon. More importantly, though, it has the power to shape our perception of our world.

Television is an especially powerful influence on the impressionable minds of the young. It serves as tutor as well as babysitter. According to the Nielson index figures for TV viewing, it is estimated that by the time a child graduates from high school he has had 11,000 hours of schooling as opposed to 15,000 hours of television. Over TV he will have witnessed by that time some 18,000 murders and countless highly detailed incidents of robbery, arson, bombings, shootings, beatings, forgery, smuggling, and torture—averaging approximately one per minute in the standard television cartoon for children under the age of ten.[1] In general, seventy-five percent of all network dramatic programs contain violence with over seven violent episodes per program hour.[2] More than half

[1]Rothenberg, "Effect of Television Violence on Children and Youth," *The Journal of the American Medical Association* (*JAMA*), pp. 1043-46 (December 8, 1975).

[2]Studies by G. Gerbner, published in part in Hicks & Liebert, *The Early Window, Effects of Television on Children and Youth*, 25, 26 (1973).

of all characters on prime time television are involved in some violence, about one-tenth in killing.[3]

B. As TV Violence Becomes More A Part of The American Way Of Life, Our Society Itself Becomes More Violent, Seriously Affecting the Mental and Physical Health of All Members Of Our Society, Especially Children.

There has been a dramatic rise of violence in our society. In 1973, more than 5,000 young Americans from 15 to 24 years of age were murdered, and an additional 4,000 committed suicide. The death rate for this age group was 19% higher in 1973 than in 1960, due entirely to deaths by violence. Murder is the fastest growing cause of death in the United States. The age group most involved, with the greatest number of both victims and arrests, is 20 to 24. In 1972, 17% of all homicide victims and 24% of all arrests were in this age group. The age group of 15 to 19 account for another 9% of all murder victims and nearly 19% of the arrests.[4]

The medical profession has determined that one of the factors behind this violence is televised violence. Based on the overwhelming scientific and medical evidence, the American Medical Association at its December 1976 annual meeting, acting on a resolution introduced by the California delegation, declared violence on TV to be an environmental health risk and asked doctors, their families and their patients to

[3]Gerbner & Gross, "The Scary World of TV's Heavy Viewer," *Psychology Today*, pp. 41-45 (April 1976).

[4]Facts in this paragraph taken from Somers, "Violence, Television and the Health of American Youth," 294 *New Eng. J. of Med.* 811 (1976).

actively oppose programs containing violence, as well as products and services of the sponsors of such programs. Out of its sense of concern for the health of our society, the California Medical Association seeks to offer its medical guidance to this Court regarding the potential health dangers should broadcasters be vested with absolute immunity from liability for irresponsibly violent programming.

C. Studies Show That Television Violence Breeds Antisocial and Violent Behavior, Especially Among the Young.

Television has become a school of violence and a college for crime. A study of 100 juvenile offenders commissioned by ABC found that no fewer than 22 confessed to having copied criminal techniques from television. Last year, a Los Angeles judge sentenced two teenage boys to long jail terms after they held up a bank and kept 25 persons hostage for seven hours. In pronouncing the sentence, the judge noted disgustedly that the entire scheme had been patterned on an "Adam 12" episode the boys had seen two weeks earlier.[5]

The Surgeon General of the United States has said, based on a six-volume study of the problem, that "there is a causative relationship between televised violence and subsequent antisocial behavior and that the evidence is strong enough that it requires some action on the part of responsible authorities, the TV industry, the government, the citizens." In that report, the Surgeon General concluded that television violence can increase a child's aggressive behavior, especially if he has a predisposition for aggression. And, in addition to this, the predisposition itself can be caused by the viewing of television.[6]

[5]"What TV Does to Kids," *Newsweek*, 62 at 67 (February 21, 1977).

Dr. Robert Liebert, Associate Professor of Psychology at the State University of New York in Stony Brook, concluded in an overview of several studies of the Surgeon General's Report that "experimental studies preponderantly support the hypothesis that there is a direct, causal link between exposure to television violence and an observer's subsequent aggressive behavior."[7]

Furthermore, there are long-term effects from viewing violent television programs. In one ten-year study, investigators found a strong correlation between the early viewing of television violence and aggressive behavior in the teenage years. In fact, according to the study, a child's television habits at age 8 were more likely to be a predictor of his aggressiveness at age 18 than his family's socioeconomic status, his relationships with his parents, his I.Q. or any other single factor in his environment. The report concluded that a preference for violent television at a young age leads to the building of aggressive habits.[8]

[6]*Surgeon General's Report by the Scientific Advisory Committee on Television and Social Behavior* (1972).

[7]*Id.*

[8]Hicks & Liebert, *The Early Window, Effects of Television On Children and Youth* (1973).

George Gerbner, Dean of the Annenberg School of Communications at the University of Pennsylvania, has also concluded from his studies that "people who watch a lot of TV see the real world as more dangerous and frightening than those who watch very little. Heavy viewers are less trustful of their fellow citizens." Gerbner also has found that the heavy television watcher gets a thick skin. He becomes conditioned to being a victim and apathetic to violence.[9]

All in all, 146 articles in behavioral science journals and related reports, representing 50 studies involving 10,000 children and adolescents from every conceivable background, all showed that viewing violence produces increased aggressive behavior in the young.[10] These facts cannot be ignored.

Petitioners have concocted a catch phrase for the purpose of their brief, labelling Plaintiff's theory "the tort of imitation." (E.g., Petition at pp. 4 and 9 *et seq.*) The complaint in this case, however, pleads traditional counts of negligence and intentional misconduct causing harm. Imitation is not a tort. To the contrary, it is the basis of all commercial television. The advertisements which pay the broadcasters their profits are designed to influence viewers' behavior, and sponsors *want* viewers to "imitate" the ads and buy their products. An established principle of advertising is that repeated exposure to a message will cause imitative behavior. Unfortunately that

[9]Gerbner, *supra*, note 2.

[10]Rothenberg, *supra*, note 1.

principle is not restricted to advertising. Studies have clearly shown that repeated exposure to televised violence leads to aggressive and violent behavior, especially in the young.

Dr. Albert Bandura of Stanford University set out to determine what happens to a child who watches aggressive personalities on television slug, stomp, shoot, and stab one another. His research reached two conclusions about aggression on TV: (1) that it tends to reduce the child's inhibitions against acting in a violent, aggressive method, and (2) the children will copy what they see.[11]

In the present case, the children who attacked Olivia Niemi did copy what they saw on television, and what they saw was an ugly rape of a little girl. The factual parallels between the movie and real life are too close: In the movie "Born Innocent" four older adolescent girls attacked a younger girl; in the present case there were four attackers, 3 female adolescents and one male adolescent, who attacked the younger girl. The rape in both cases was forcible and was accomplished by means of an artificial instrument. The attack on Olivia Niemi took place only three days after the attack was shown on television, and most importantly, the attackers admitted being influenced by what they had seen on the television screen. Because the children acted out what they saw, we now have a real life victim, with real life scars—brought to her by NBC.

[11]Bandura, *Aggression: A Social Learning Analysis* (1973).

V. CERTIORARI SHOULD BE DENIED BECAUSE THE FIRST AMENDMENT DOES NOT CREATE ABSOLUTE IMMUNITY FROM LIABILITY FOR CONDUCT WHICH PROXIMATELY CAUSES HARM.

The First Amendment of the United States Constitution provides:

> Congress shall make no law . . . abridging freedom of speech, or of the press; or the right of the people peaceably to assemble . . . .

Freedom of speech was recognized as a fundamental right and applied to the States in the case of *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1930).

The freedom of speech, however, has *never* been interpreted to give anyone a blanket immunity from liability.[12] As this Court said in *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-51, 81 S.Ct. 997, 1006-07, 6 L.Ed. 2d 105, 116-17 (1961):

> *At the outset we reject the view that freedom of speech and association [citation], as protected by the First and Fourteenth Amendments are 'absolutes.'* . . . Throughout its history, this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to

[12]For example, in *Gertz v. Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974), this Court refused to extend the First Amendment umbrella to shield a publisher or broadcaster from liability for injuries to a private individual resulting from the *negligent* publication of defamatory falsehoods. In upholding the Iowa statute, the Supreme Court held that as long as the requisite elements of negligence were proven, a publisher or broadcaster could be held civilly liable for injuries to reputation. Why should not the same principles apply to allow recovery from a broadcaster on a negligence theory for foreseeable personal injuries?

talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. See, e.g., *Schenck v. United States,* 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031; *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919; *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed. 1356; *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 1498. On the other hand, general regulatory statutes, not intended to control the content of the speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. [Citations] (Emphasis added.)

In a note appended to the above-quoted text, the Court cites numerous examples of legally recognized limitations on free speech, such as libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, etc.. To that list could be added other torts committed by speech, such as negligent misrepresentation, interference with contractual or business relations, unfair competition and false imprisonment. Likewise, doctors, lawyers and other professionals may be held liable for bad advice, and yet the First

Amendment would not shield them from accountability for their speech-related activities. Why should the law treat broadcasters differently from other tortfeasors? If their conduct leads to foreseeable harm, they should be equally liable for the consequences.

Like any other enterprise, broadcasters should be required to weigh the risks of their activities before embarking on a commercial venture, and pay damages if they injure anyone. (See, e.g., discussion of "enterprise liability" in *Haft v. Lone Palm Hotel,* 3 Cal. 3d 756, 775 n. 20, 478 P.2d 465, 91 Cal. Rptr. 745 (1970).) Why should their liability be different because they sell air-time rather than some other product?

Furthermore, Plaintiff in the present action does not seek to impose liability on the basis of the defendants' words alone. *All* of the programming activities of the broadcasters must be scrutinized in determing their liability. The Court must keep in mind that *commercial television is a marketing medium.* Programmers know who is watching what and when. This information, in turn, is used in the purchasing of programs and then in selling the programs to sponsors. The sponsors have to know how many potential customers they may be reaching. The demography of the viewing audience and the potential selling power of the program is what the Nielson ratings are all about.

In the present case, NBC surely knew that the 8:00 o'clock evening hour would attract a large audience of young people. Why else would they solicit

the Disney Corporation as a sponsor? NBC was also surely aware of the potential impact of its advertisement on the flip pages in TV Guide which promoted "Born Free" and "Born Innocent" to be shown at the same hour only a day apart. Are these corporate marketing and programming decisions protected by the First Amendment?

Certainly, the programming activities of NBC in this case could be found harmful, especially to children. NBC received thousands of complaints after the airing of "Born Innocent," showing that viewers found the program offensive. Subsequently, the broadcasting association of which NBC was a member censured NBC for showing the program at 8:00 p.m., and caused NBC to delete most of the offensive rape scene from any future showings, and made them show the picture between 11:00 and 12:00 at night rather than at 8:00. Why were these programming precautions not taken in the first place? Should NBC be held immune from liability for the consequences of its programming decisions?

Irresponsible speech is not free: One cannot say just anything, anywhere, anytime, to anyone. As Justice Holmes noted with the simple wisdom that has made the statement a cliché, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic." (*Schenck v. United States,* 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470, 473 (1919).)

To uphold the trial court's ruling would be to place broadcasters above the civil law. It would be a viola-

tion of Plaintiff's right to equal protection under the law to hold the broadcaster immune, for if Plaintiff were injured by a tortfeasor other than a broadcaster she would have a remedy. To hold a broadcaster immune from liability would also violate Plaintiff's right to due process and would violate the fundamental principle of law which guarantees that for every wrong there is a remedy. (Calif. Civ. Code §3523.) Accordingly, the trial judge's ruling granting the broadcaster total immunity was properly reversed by the State Court of Appeal and that decision should not be disturbed.

CONCLUSION

Based upon the proper application of state law, combined with an appropriate interpretation of the First Amendment, the California Court of Appeal remanded this case for trial. There, a full record can be developed and the constitutional issue fleshed out with facts. Then at last, a little girl who was the victim of a corporate decision to air "Born Innocent" at the time and manner it was shown, will have her day in court.

Those seeking certiorari, however, would have this Court cloak television with absolute First Amendment immunity. In a society where 22% of juvenile crimes are copied from television, and where violence is becoming a national epidemic, can we afford to allow broadcasters, who have the power to reach into millions of homes and to shape the minds of the young, to be totally free from civil responsibility for their programming? The scientific evidence is overwhelm-

ing that TV violence causes violence on the streets. The physicians of California and of this country are warning us of the dangerous impact of violent television programming, particularly on our children.

We cannot ignore the profound social implications of their warning, just as we cannot ignore the compelling irony of the real life victim who was truly "born innocent." It would be a sad day if our social values come to cherish a few moments of television over the health and well-being of this little girl—not to mention the millions of children who physicians say are being psychologically damaged by television every day.

The law is clear. The First Amendment *cannot* be a shield from civil responsibility for foreseeable consequences of harmful acts. Neither the United States Supreme Court nor the California Supreme Court has ever so held. Thus, the procedurally irregular ruling of the trial court in granting a judgment on the pleadings after viewing the film as evidence was properly overturned. Therefore, to protect the lives and health of those likely to be endangered by unnecessarily violent television programming, the California Medical Association respectfully urges this Court to deny certiorari at this time.

Dated, April 13, 1978.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1308

NATIONAL BROADCASTING COMPANY, INC., and CHRONICLE PUBLISHING CO.,

Petitioners and Defendants,

vs.

OLIVIA NIEMI, by and through her Guardian *ad Litem*, Valeria Pope Niemi,

Respondent and Plaintiff.

On Petition for Writ of Certiorari to the Court of Appeal for the State of California.

Brief of Amici Curiae Writers Guild of America, West, Inc., Directors Guild of America, Inc., and Motion Picture Association of America, Inc., in Support of Petition for Writ of Certiorari of Petitioners and Defendants National Broadcasting Company, Inc., and Chronicle Publishing Co.

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SUBJECT INDEX

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Pursuant to Rules 35 and 42(1) of the Rules of this Court, the Writers Guild of America, West, Inc. ("Writers Guild" or "WGA"), the Directors Guild of America, Inc. ("Directors Guild" or "DGA"), and the Motion Picture Association of America ("Association" or "MPAA") respectfully file their Brief Amici Curiae herein in support of Petitioners' and Defendants' Petition for Writ of Certiorari. The written consents of the parties have been filed. The case is one whose impact will be incalculable upon amici and upon creativity in this society.

Interest of Amici Curiae.

The Writers Guild is the collective bargaining representative for writers who are employed to write the entertainment portion of motion pictures and television programs.

The Directors Guild is the collective bargaining representative for directors who are employed to direct motion pictures or television programs.

Each Guild has industry-wide agreements with the three major networks, including defendant National Broadcasting Company Inc., with all major motion picture and television producers, and with hundreds of other employers. The Writers Guild's membership numbers 4,000 or more writers. These writers are the creators of the dramatic shows, serials, documentaries and other programs which dominate television. The Directors Guild's membership numbers approximately 4,000 or more. Its members are creative personnel who direct the dramatic shows, serials, documentaries and other programs which dominate television.

The Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and distributors of motion pictures to theaters and television in the United States, to wit:

Allied Artists Pictures Corporation
Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer, Inc.
Paramount Pictures Corporation
20th Century-Fox Film Corp.
United Artists Corporation

Universal Pictures, a division of Universal City Studios, Inc.
Warner Bros., Inc.

A major category of prime time television and of the rerun market for television films is the special dramatic show, which may take the form of a one- or two-hour motion picture for television. Such was the award-winning program "Born Innocent", which is the subject of this action. Another major category is the feature motion picture which has previously been released to theaters. Although the specific controversy in the instant case involves a film exhibited on television, the issues posed here and to be answered by the Court will also have direct implications for films exhibited theatrically.

This case is an attempt to impose liability on the producers, exhibitors and advertisers of a television show because of a crime committed by third persons who watched the dramatic show. The ultimate defendants, and the persons truly affected, in such cases will be the writers, producers, distributors and exhibitors of the programs. That is, insofar as its deterrent effect upon creativity and free expression is concerned, the opinion of the California Court of Appeal is the equivalent of imposing liability on the creators of television programs based upon dramatic content of those programs. This case, therefore, will have far-reaching impact on the entire motion picture industry and the public. It raises basic First Amendment issues, and is of special importance to the two Guilds, the MPAA and their members. They are the persons who will be most directly affected by these proceedings and through them the very climate of our society: we point

to the chilling impact on the creativity of writers and directors and on the free expression and dissemination of ideas.

Preliminary Statement and Summary of Argument.

This *amici curiae* brief is confined to the First Amendment issue.

The question presented is whether the exhibitor, and ultimately the writer or producer, can be exposed to civil liability because, allegedly, a viewer of the drama is inspired thereby to commit a crime. It should be emphasized at the outset: this is *not* a case where the writer or publisher has uttered false facts, libeled or invaded the privacy of a plaintiff, or advocated immediate or even remote action.

We believe there can be only one answer to the issue posed by this case: a free society cannot impose a threat of such liability upon writers or others in the creative process, including actors, directors, producers, broadcasters, and their employers. Otherwise, the First Amendment and society's right to the creativity of its members and to the reception of literary and artistic works would be crippled. No authority exists for the imposition of liability as here sought. In fact, the issue is one which the First Amendment, the cases under it, and our society have determined in favor of the creator. We urge that this Court grant certiorari and emphatically reaffirm the governing principles, reverse the California Court of Appeal and approve the trial court's judgment.

ARGUMENT.

I.

The Expression of Ideas and Emotions and Their Representation in Drama on the Stage, in Motion Pictures, or Over Television, Cannot Be Inhibited by the State Through Penal Statutes or by Permitting Its Civil Courts to Impose Liability Therefor.

A. Unless It Is Obscene, the Dramatic Presentation of an Idea or Action Is Fully Protected by the First Amendment.

It has long been the law that dramatic expressions, including mere "entertainment", and their publication and public performance, are protected by the First Amendment.

Winters v. New York (1974), 333 U.S. 507, 510, 92 L.Ed. 840, 847;

Kingsley International Pictures Corp. v. Regents of University of New York (1959), 360 U.S. 684, 3 L.Ed.3d 1512;

Barrows v. Municipal Court (1970), 1 Cal.3d 821, 83 Cal.Rptr. 819.

Indeed, cases involving motion pictures, which are the mass media of dramatic works, have most eloquently expressed this basic point. See *infra*, Part C.

Television, of course, is similarly a mass medium of expression protected by the First Amendment.

Rosenbloom v. Metromedia (1971), 403 U.S. 29, 20 L.Ed.2d 296;

Red Lion Broadcasting Co. v. FCC (1969), 395 U.S. 367, 386, 23 L.Ed.2d 371, 387;

Weaver v. Jordan (1966), 64 Cal.2d 235, 49 Cal.Rptr. 537.

The few and very narrow limitations which this Court has permitted upon free expression (see, *e.g., Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 571, 86 L.Ed. 1031, 1034-1035) simply do not apply to creative literature which is not directed to an attack upon the personality of the plaintiff (*e.g.*, defamation, right of privacy), or which is not obscene or a direct incitement of riot. Omitting such personal attacks and omitting non-protected obscenity, an individual's imagination, emotion and ideas—the core of the protected subject matter of the First Amendment—are entitled to absolute freedom of expression in dramatic literature. Writers, directors and producers are entitled to create, produce, and publish their works without fear of liability, whether imposed by state penal statute or by civil actions brought by alleged injured persons.

In *Gertz v. Welch* (1974), 418 U.S. 323, 339-340, 41 L.Ed.2d 789, the Court stated:

> "We begin with the common ground. Under the First Amendment *there is no such thing as a false idea*. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. . . ." (emphasis added).

The case at bar raises no question of libel or invasion of privacy. Plaintiff's case must rest either on the theory that the publication, like obscenity, is itself infected with danger to society; or on the theory that the defendants' presentation was a direct incitement to the tortfeasor to injure the plaintiff. Apart from the fact that the scene depicting the crime in "Born Innocent" is a fleeting portion of the film, the first theory has no

place in our society and is anathema to our tradition of free speech. The second theory is based on *Weirum v. RKO General, Inc.* (1975), 15 Cal.3d 40, 123 Cal. Rptr. 468. But *Weirum* does not support plaintiff's claim. *Weirum* was a direct exhortation to act, as opposed to discussion or advocacy of an idea. Individual radio listeners were urged to participate in a commercial contest by driving the Los Angeles streets and freeways. Injury resulted from the success of these exhortations.[1]

B. The Expression of Dramatic Ideas and Actions Cannot Properly Be Inhibited by Penal Statutes or by the Threat of Civil Liability Through the Civil Courts.

Unless they are obscene, dramatic presentations cannot be subjected to criminal statutes. See *Winters, Kingsley,* and *Barrows,* cited above, especially *Barrows* at 830 of 1 Cal.3d, hereafter quoted.

The constitutional protection goes much further. What the state may not do by criminal statute, it likewise may not do by civil statute which would impose civil liability for the expression of otherwise protected speech.

This Court stated in *New York Times v. Sullivan* (1964), 376 U.S. 254, 277-278, 11 L.Ed.2d 705:

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[1]The Court's characterization of the case was as follows:

> "The giveaway contest was no commonplace invitation to an attraction available on a limited basis. It was a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit." (15 Cal.3d at 48).

Weirum also confirms that the issue, in tort theory, as NBC contends, is one of law. At pages 45-46 of 15 Cal.3d, the Supreme Court stated:

> "The primary question for our determination is whether defendant owed a duty to decedent arising out of its broadcast of the giveaway contest. The determination of duty is primarily a question of law."

> "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . . Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' "

The policy reason for prohibiting the imposition of civil liability is that the threat of such liability will inhibit the creativity of artists and creators which is indispensable for a free and progressive society. In his concurring opinion in *Kingsley International Pictures Corp. v. Regents of University of New York* (1959), 360 U.S. 684, 3 L.Ed.2d 1512, which dealt with an obscenity and licensing statute, Justice Frankfurter put it this way:

> "Always remembering that the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit, we have struck down legislation phrased in language intrinsically vague, unless it is responsive to the common understanding of man even though not susceptible of explicit definition. The ultimate reason for invalidating such laws is that they lead to timidity and inertia and thereby discourage the boldness of expression indispensable for a progressive society." (360 U.S. at 695, 3 L.Ed.2d at 1520).

C. Cases Involving Plays and Motion Pictures Dramatically Illustrate the Above Principles and Show That No Liability Can Be Imposed on the Creators and Broadcaster Here.

Although the cases involving motion pictures are primarily license cases or criminal prosecutions (in the obscenity field), this Court has consistently held that ideas and drama are absolutely protected under the First Amendment.

In *Joseph Burstyn, Inc. v. Wilson* (1952), 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, a motion picture film was banned on the ground that it was "sacrilegious." The Court struck down the New York statute. At pages 500-501 of 343 U.S., 1105-1106 of 96 L.Ed., the Court stated (footnote omitted):

> "The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters v. New York,* 333 U.S. 507, 510, 92 L.Ed. 840, 847, 68 S.Ct. 665 (1948):
>
> " 'The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.'
>
> "It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree."

In *Kingsley International Pictures Corp. v. Regents of New York* (1959), 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512, the New York Court of Appeals held

that the motion picture "Lady Chatterley's Lover" "alluringly portrays adultery as proper behavior," and that the New York legislature by its licensing statute had properly required "the denial of a license to a motion picture 'because its subject matter is adultery presented as being right and desirable for certain people under certain circumstances.'" 360 U.S. at 687-688. This Court reversed and stated:

> "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.
> "Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, 'a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.' *Whitney v. California*, 274 U.S. 357, at 376, 71 L.Ed. 1095, 1106, 47 S.Ct. 641 (concurring opinion). 'Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech. . . .' Id. 274 U.S. at 378." (360 U.S. at 688-689, 3 L.Ed.2d at 1516-1517.)

Bearing in mind the limitations on state action in cases involving the First Amendment (see *New York Times*, 376 U.S. 254, 277-278, *supra*) it is clear that a husband who lost his wife to an adulterer would have no civil cause of action against the writer, producer or exhibitor of a motion picture which discussed or even advocated adultery. It is similarly clear here, we submit, that plaintiff cannot have a cause of action against the defendants for the broadcast of "Born Innocent."[2]

The content of ideas and emotions, especially in dramatic literature, is absolutely protected by the First Amendment. We do not concede in the slightest that the dramatic program here involved was offensive, dangerous, immoral or in any other way condemnatory. But even if it were, the remedy is not to open the courtroom to litigants who claim that third persons were improperly influenced by the broadcast and then caused injury to the plaintiff. As was said in *Butler v. Michigan* (1957) 353 U.S. 380, 383, "Surely, this is to burn the house to roast the pig."

It is not for the Government—whether through penal statutes, licensing statutes, or imposed civil liability upon creators because third persons have been influenced by their works—to shield the public from or to impose liability because of some kinds of speech

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[2]See also *Erznoznik v. City of Jacksonville* (1975), 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125. *Erznoznik* shows that appellant's argument that protection of the health of children is involved and therefore freedom of communication must be restricted and liability may be imposed in this case, is without merit. The court stated:

> "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." (422 U.S. 205, 213, 45 L.Ed.2d 125, 133.)

on the grounds that they are more offensive or dangerous than others. The First Amendment does not permit such a course.

II.

The Self-Censorship Which Would Be Engendered by the Civil Liability Sought to Be Imposed Here Must Be Avoided Under and Is Prohibited by the First Amendment.

From the beginning of this country, there was to be the widest possible freedom to speak and publish.

> "Printing presses shall be subject to no other restraint than liableness to legal prosecution for false facts printed and published." Thomas Jefferson: Proposed Constitution for Virginia, 1783.[3]

Civil statutes which impose liability for speech and which reach beyond the boundary proper under a penal statute violate the First Amendment. The reason is that "the fear of damage awards" constitutes a prior restraint upon free speech and expression. *New York Times v. Sullivan* (1964), 376 U.S. 254, 277-278, 11 L.Ed.2d 686, 705, *supra*, Part I B. As Justice Frankfurter stated in *Kingsley*:

> "The ultimate reason for invalidating such laws is that they lead to timidity and inertia and thereby discourage the boldness of expression indispensable for a progressive society." (360 U.S. at 695, 3 L.Ed.2d at 1520.)

[3]The contrast with other societies is stark:

> "Why should freedom of speech and freedom of the press be allowed? Why should a government which is doing what it believes is right allow itself to be criticized? It would not allow opposition by lethal weapons. Ideas are much more fatal things than guns." V. I. Lenin: Nieman Reports, January, 1956, quoted in "The Great Quotations", compiled by George Seldes, Pocket Book Edition, 1967, p. 392.

And, as was said in *Smith v. California*, 361 U.S. 147, 154, 4 L.Ed.2d 205, 211 (1959):

> "The booksellers' self-censorship, compelled by the state, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

These judicial pronouncements reflect the teaching and experience of our society and of artists themselves. From Shakespeare[4] to the great writers of today, self-censorship created by fear of social pressure or of liability has been seen as a barrier to free and creative expression.

In another time, and in another society, Tolstoy wrote:

> "You would not believe how, from the very commencement of my activity, that horrible Censor question has tormented me! I wanted to write what I felt; but all the same time it occurred to me that what I wrote would not be permitted, and involuntarily I had to abandon the work. I aban-

[4]In King Henry VIII, Shakespeare gives the following speech to Cardinal Wolsey:

> "We must not stint
> Our necessary actions, in the fear
> To cope malicious censors; which ever,
> As ravenous fishes, do a vessel follow
> That is new-trimm'd, but benefit no further
> Than vainly longing. What we oft do best,
> By sick interpreters, once weak ones, is
> Not ours, or not allow'd; what worst, as oft
> Hitting a grosser quality, is cried up
> For our best act. If we shall stand still,
> In fear our motion will be mock'd or carp'd at,
> We should take root here where we sit, or sit
> State-statutes only."

Shakespeare, *King Henry VIII*, Act 1, Scene 2.

doned, and went on abandoning, and meanwhile the years passed away." Quoted by Chaffe, Free Speech in the United States, p. 241, and reproduced as footnote 6 to Chief Justice Warren's dissent in *Times Film Corp. v. City of Chicago* (1961), 365 U.S. 47, 66, 5 L.Ed.2d 403, 417.

Liability may be imposed for the harm directly inflicted on individuals by defamatory falsehood or by unreasonable exposure of intimately personal details of their lives. See discussion, *Gertz v. Welch,* 418 U.S. 323, 341 ff, 41 L.Ed.2d 789, 806. But it is impermissible to extend liability of the creator or publisher to injuries caused by third persons who allegedly were influenced by the content of drama televised to the general public. Such extension would in effect create liability to society at large, as this case itself illustrates, and is unthinkable in a free society. Is the writer of a future "Crime and Punishment", whoever he may be, or the television adapter and producer of Dostoyevsky's classic to be liable to the victims or survivors of axe murders? Is the author of Hamlet to be liable to the heirs of a murdered stepfather? In non-dramatic fields, are the publishers of stories of crimes to be liable to victims of subsequent crimes which are patterned on the details in newspapers or television accounts? We think it is clear that to permit such liability would undermine the First Amendment and the very essence of a free society. The "expression of the sum total of those considerations of policy"[5] which lead a court to define duty and proximate cause require a judgment as a matter of law for defendants here.

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[5]The phrase is Prosser's in Law of Torts (4th Ed. 1971), pp. 325-326.

Conclusion.

Petitioners speak here for the creative community in the television and motion picture industry. Society requires art and drama if it is to exist as a community of feeling and free persons. The inevitable and pervasive censorship and self-censorship that would accompany liability as here sought would be devastating.

We respectfully submit that it will not do to say that all that has occurred in this case so far is that the California courts have not seen fit to prevent a trial. The clear violation of the First Amendment cannot be glossed over on the grounds that a quirk of California procedure is involved, that liability has not yet attached, and that the expensive and debilitating process that stretches ahead will permit the operation and protection of the First Amendment. Lawyers and judges know better than most that trials are still ordeals by combat, that emotions and pockets are stripped and drained by litigation, and that the threat of the courthouse serves still as a deterrent to lawful acts and free expression. Consequently, the severe inhibition upon creativity and expression will flow as much from the threat of expensive and debilitating litigation as from adverse jury verdicts. The hand of the law will be heavy on the hand of the writer, and his imagination will be enveloped by the cloud of potential litigation.

We are dealing here with freedom and the creative process. As the California Supreme Court stated in a comparable setting:

> "Courts must therefore move here with utmost caution; they tread in a field where a lack of restraint can only invite defeat and only impair

> man's most precious potentiality: his capacity for self-expression." (*Zeitlin v. Arnebergh* (1963), 59 Cal.2d 901, 923, 31 Cal.Rptr. 800).

A hearing should be granted by this Court and the judgment of the trial court should be affirmed clearly and emphatically. Because the mere filing of such actions to some extent must inhibit the free expression of ideas, no potential plaintiff should be given hope that a similar suit will succeed in the future.

Respectfully submitted,

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